accession 25912

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 308.

JAMES COYNE, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 11, 1887.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 5th day of January, A. D. 1883, came James Coyne, by Edward L. Johnson, Esq., his attorney, and filed in said court his complaint and sued out of said court a writ of summons against the Union Pacific Railway company.

And the said summons is in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States for the District of Colorado.

JAMES COYNE, Plaintiff,
versus
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Complaint. Filed in the clerk's office this 5th day of January, A. D. 1883.

2 The President of the United States of America to the above-named defendant, Greeting:

You are hereby notified that an action has been brought in said court by the above-named plaintiff against you as defendant to recover the sum of fifty thousand dollars damages sustained by plaintiff from injuries to his person suffered through the negligence of defendant in directing the plaintiff in his service and employment as a construction laborer on the defendant's railroad near Byers' station, in said district, on the 21st day of May, 1882, and for the cost of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for said sum of $50,000.00 damages, and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 5th day of January, A. D. 1883, and of the Independence of the United States the 107th year.

[Seal U. S. Cir. C't, Colorado.]

(S'g'd) EDWARD F. BISHOP, *Clerk*,
By WM. E. ROGERS,
Deputy Clerk.

3 *Proof of Service.*

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, *Jan'y 5th, A. D.* 1883.

I hereby certify that I received the within writ on the 5th day of January, A. D. 1883, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by delivering to A. A. Egbert, superintendent of said The Union Pacific Railway Company, personally a true copy of the within writ, at the day and time as follows—at Denver, county of Arapahoe, on the 5th day of January, A. D. 1883.

This writ therefore returned executed as the law directs this 6th day of January, A. D. 1883.

(S'g'd) WALTER A. SMITH, *Marshal,*
By SIM. W. CANTRIL,
Deputy Marshal.

(Endorsed:) Gen. No., 1093. Circuit court of the United States for the district of Colorado. James Coyne, plaintiff, *versus* The Union Pacific Railway Company, defendant. Summons. Filed this 6th day of Jan'y, A. D. 1883. (S'g'd) Edward F. Bishop, clerk, by Wm. E. Rogers, deputy clerk. E. L. Johnson, of Denver, attorney for plaintiff.

4 And afterwards and on, to wit, the 16th day of June, A. D. 1883, came again the said plaintiff, by his attorneys, and filed in said court and in said cause his amended complaint; and the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court.

JAMES COYNE, Plaintiff,
against
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff, James Coyne, complains of the defendant, and for his cause of action respectfully shows the court—

1. That plaintiff is a citizen of the United States and of the
5 State of Colorado; and that the defendant, The Union Pacific Railway Company, is a corporation existing by virtue of and organized under the laws of the United States.

2d. That defendant, during the month of May, A. D. eighteen hundred and eighty-two (1882), owned and operated a railroad for the carriage of passengers and goods between the city of Kansas City, in the State of Missouri, and the city of Denver, in said State of Colorado.

3d. That on, to wit, the fourteenth day of May, A. D. 1882, at the city of Denver aforesaid, the defendant hired the plaintiff to work for defendant in the construction and repair of its railway track on its said railroad and at and between the stations of Byers and River Bend, in said State of Colorado, as a common laborer or construction hand, under the direction of its construction foreman and bosses.

4. That on, to wit, the eighteenth day of said month of May, the defendant placed the plaintiff, he being still in the service of defendant in the same capacity as aforesaid, in the charge and under the direction of one Patrick McCormic, one of defendant's construction bosses and foremen, at and near Byers' station aforesaid, and it then became the duty of the plaintiff, in his said employment, and defendant did then instruct and command the plaintiff, as its servant as aforesaid, to obey the orders and to comply with and faithfully observe the directions of said McCormic in all things pertaining to plaintiff's said service and employment.

5. That it was part of the duty of said McCormic, as construction boss as aforesaid, to control and direct the movements of the
6 construction train under his charge and to provide for the safety thereof, and to guard against all collision and conflict between the same and all other the defendant's trains; and it was likewise part of said McCormick's duty and employmont as such construction boss to distribute railway ties and rails along said road and to remove the same from place to place along the same as might be necessary, and to lay new rails in place of old ones, and generally to direct and oversee the repair and construction of said track.

6th. That on the twenty-first day of said month of May and between the hours of 12½ and 3 p. m., the plaintiff being still in the service of defendant as aforesaid and under the orders of said McCormic, proceeded by his order and in company with him and with about twenty other men, likewise under his orders and in the like employment as plaintiff, from the said Beyers' station to a point about two miles east on said railroad upon a construction train consisting of an engine, tender, caboose, and flat car, said train being under the control and direction of said McCormic.

That at the point last mentioned said McCormic halted said train and ordered plaintiff and others of said men to load upon said flat car certain steel rails lying at a short distance from the track; that plaintiff and about fifteen others of said men accordingly went to said pile of rails and proceeded to load the same as ordered, he, said McCormic, remaining upon said flat car and overseeing and directing the work.

That such railroad rails were about twenty-nine (29) feet in length and of great weight, to wit, four hundred pounds and more; that in handling and loading them on the said flat car
7 from eight (8) to ten (10) men were required, and it was necessary, in order to load them with safety and dispatch, that the gang so loading them should act in concert and under the orders and at the word given by some one person; that plaintiff and his fellow-workmen had loaded all the rails on the said flat car,

except some two or three that remained, in the following manner, to wit: The said McCormic, standing upon the flat car, would give the order for each particular gang, the men being divided into two gangs for this purpose, to raise the particular rail which they would select from the pile when they were in position to do so; they would then move abreast towards the said flat car, and when they had come within a certain distance of said car they would halt and dress by order, and at the commands, "Raise!" "Heave!" given by said McCormic, the said gangs would raise and heave the rails upon the said car; that this was a safe and expeditious method of loading said rails, and the plaintiff and his fellow-workmen had, up to the time of the injury hereinafter complained of, waited for and depended upon the commands of said McCormic in loading said rails.

That in loading said rails by the aforesaid method there was very slight danger of accident and injury to the men.

That after all the said rails but two or three had been loaded on the said car by the aforesaid method plaintiff was ordered by the said McCormic to assist in loading one of said last remaining rails, and by oaths and violent language commanded plaintiff to take hold and assist in loading the rail that was being carried forward by the gang other than the one that plaintiff had been
8 theretofore working with, and, using the same violent language as aforesaid, urged the plaintiff and his fellows to make great haste, and in obedience to the said commands the plaintiff hastened forward to secure a place on the rail that was being carried forward as aforesaid in order to assist in loading said rail on said car; that when plaintiff and his fellows with said rail had reached the point where said McCormic had always before given the order to "dress up" and the orders to "raise" and "heave" he, the said McCormic, with violent language and oaths, commanded them to throw the said rail upon the said car in any way and not to wait for orders.

That up to the instant that said last order was given plaintiff did not know that it would be given, nor had he any reason to believe nor did he believe it would be given, but believed that the said McCormic would give the same orders for loading that rail which had theretofore been given for the loading of all the other rails.

That, obeying the order of said McCormick to throw the rail, plaintiff and his fellow-workmen did throw the same, but for the want of concert of action in so doing the said rail fell upon the car or struck the side of the car in such a way as to fall back and injure plaintiff as is hereinafter alleged; that the method of loading the said rail adopted by the said McCormic was extremely hazardous, as was well known to said McCormic, but that plaintiff and his fellow-workmen loading said rail had no time for deliberation or concert of action, and acted under the sudden impulse created by the loud, violent, and profane language and commands of said McCormic.

9 That when said McCormic ordered plaintiff and his fellow-workmen to throw said rail on the car as aforesaid he also informed them that a train was approaching, and neither plaintiff nor the other workmen in charge of said rail knew how close said

train was, and owing to their occupation and situation did not have time or opportunity to ascertain how close said train was; that this and the suddenness and violence of McCormic's commands confused plaintiff and the others having hold of the said rail so that they were unable to reflect or protect themselves.

That by reason of the haste and excitement caused by the said violent commands of said McCormic, and by reason of the said McCormic's departing from the usual mode and method of loading the said rails, in the loading of this rail as aforesaid plaintiff and his fellow-workmen were unable to act with that necessary and proper deliberation and unity of effort that had been observed before in the loading of said rails, and therefore said rail, by reason of the negligence, mode, and method adopted by said McCormic in the loading of the same, was not thrown clear upon said car, but fell short and struck either in its whole length or at one end against the side of said car, the level of which was higher than the heads of plaintiff and said gang, and falling upon plaintiff bore him back and down upon some ties lying near said track and crushed and cut plaintiff's right foot and leg.

Plaintiff further alleges that between said pile of rails and said flat car there were many railway ties, which defendant had placed there and which lay in various places and positions; that in
10 loading the said rails up to the said last one just mentioned plaintiff was able with care to pick his way through said ties without stumbling or other inconvenience, but that when hurried as aforesaid by said McCormic it was much more difficult for him and said gang to both watch their footsteps and to give due attention to the loading and throwing of said rails.

Plaintiff further alleges that said McCormic knew that said freight train was overdue at said Byers' station at the time he left said station as aforesaid with said construction train, and knew that said freight train might at any moment meet said construction train, and plaintiff knew nothing about said freight train.

Plaintiff further alleges that he, the plaintiff, used all due care, skill, and attention possible under the circumstances in the handling of the said rail by which he was injured as aforesaid; that he obeyed the sudden and violent orders of said McCormic as above mentioned without himself being conscious of or reflecting or having time to reflect on the danger to which he would be exposed by so doing and because he believed it to be his duty and it was his habit to obey the said McCormic's orders in the line of his service.

Plaintiff therefore avers that he suffered the said injury by reason of the negligence of the defendant and without any fault or negligence of his own.

That said McCormic could have had the said freight train stop a few minutes or could have gone back with his construction train to the side track at Byers' station and returned after the passage of the freight train for the remaining rails.

11 Plaintiff further alleges that, by reason of said rail falling upon his foot and leg as aforesaid, he has suffered great bodily and mental pain and anguish; was confined to his sick bed for

months; has suffered the loss by necessary amputation of his right leg, and has otherwise greatly suffered in mind, health, and fortune.

Wherefore he prays judgment against the defendant for the sum of fifty thousand dollars and his costs.

(Endorsed:) No. 1093. James Coyne *vs.* The Union Pacific Railway Company. In the circuit c't for the district of Colorado. Amended complaint. Filed June 16, 1883. (S'g'd) Edward F. Bishop, clerk. Wells, Smith and Macon, W. H. Stearns, att'ys for pl'f.

And afterwards and on, to wit, the 19th day of December, A. D. 1883, came again the said defendant, by Messrs. Teller & Orahood, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

JAMES COYNE, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The Union Pacific Railway Company, defendant herein, answering the complaint of the said plaintiff—

Denies that on the fourteenth day of May, 1882, or at any other time it hired plaintiff to do work for defendant in the
12 construction or repair of its railway track between the stations of Byers and River Bend, in the State of Colorado, as a common laborer or construction hand under the direction of its construction foreman, boss, or under any person or for any purpose whatever.

Denies that on the eighteenth day of May it placed the plaintiff in charge of and under the direction of Patrick McCormick; denies that the said Patrick McCormick was the construction boss of this defendant, and denies that it ever became the duty of the said plaintiff by reason of any employment by this defendant to obey the orders of this defendant or the orders of the said McCormic or any other person in the employ of this defendant.

Denies that it was a part of the duty of the said McCormick as construction boss to control and direct the movements of the construction train, and denies that it was the duty of the said McCormick to provide and guard against collisions between trains.

Denies that it was any part of said McCormick's duty to distribute railway ties and rails along said road and to remove the same from place to place.

Denies that on the 21st day of the month of May, 1882, or at any other time the plaintiff, under the orders of the said McCormick or any other person, proceeded with about twenty men or any number of men from Byers' station to a point two miles east, on the said

railroad, upon a construction train, or to any other point on said road or upon any train whatever, and denies that there was at that time any such train, engine, tender, or caboose or flat car,
13 under the control and direction of the said McCormick.

Denies that at the point mentioned in said complaint said McCormick halted the said train and ordered the said plaintiff and others to load any steel rails or any property whatever upon the train, and denies that the plaintiff did with others or by himself proceed to load the same, and denies that he was ordered so to do by the said McCormick, and denies that the said McCormick remained upon the flat car to oversee and direct the work; denies that in doing the work, as set forth in said complaint, that it was necessary in order to load said rails with safety and dispatch that the gang so loading them should act in concert under the orders and word given by some other person.

Denies that the plaintiff and any other workmen loaded any rails whatever at that place and time as set forth in said complaint, and denies that if any rails had been loaded at that point they had been loaded in the manner set forth in said complaint.

Denies that the said McCormick, standing upon the flat car, gave any orders for each particular gang or any particular gang; denies that they were divided into two gangs for the purpose of raising the rails; denies that they would, having selected a rail from the pile, move abreast towards the said flat car, and when they got within a certain distance of said car halt and dress by order, and says if any such thing was done it was done for their own convenience and at their own option and under their own orders.

Denies that when said rail was thus carried they would halt and dress by order, and denies that the commands, "Raise, heave,"
14 were given by the said McCormick to said gangs or by any other person, unless it were by some of the workmen themselves.

And denies that the workmen or any of them had, up to the time of the injury to the plaintiff, waited upon or depended upon the commands of the said McCormick in loading said rails.

Admits that in loading the said rails by the aforesaid method there was very slight danger of accident or injury to the men.

Denies that after all the rails but two or three had been loaded on the said car by the aforesaid method plaintiff was ordered by the said McCormick to assist in loading one of the remaining rails, who, by oaths and violent language, commanded plaintiff to take hold and assist in loading the rail that was being carried; denies that McCormick used any violent or offensive language whatever, and says if he did it did not tend to produce or cause any injury to the said plaintiff.

Denies that before that time the plaintiff had been working with any other gang, and denies that the said McCormick, either with violent language or otherwise, urged the plaintiff and his fellows to make haste; and denies that in obedience to any such commands plaintiff did make haste to secure a place on the rail; and denies that when the plaintiff and his fellows with their said rail had reached any

point whatever said McCormick, with violent language and oaths, commanded them to throw said rail upon said car in any way and not to wait for orders; and denies that the said McCormick gave any orders whatever in respect to throwing said rail, and denies that up to the instant said order was given plaintiff did not know that it was to be given.

15 Denies that plaintiff believed said McCormick would give any order for loading said rail, and denies that he supposed or believed he would give the same orders for loading said rail which had heretofore been given for loading all the other rails, and denies that in obedience to given order said workmen did throw the rail, or that plaintiff and his fellow-workmen did throw the same.

Admits that for want of concert of action, so had, the said rail fell on the car or struck the side of the car in such a way as to fall back and injure the plaintiff as set forth in the complaint.

This defendant specially alleges that the said accident was caused by inadvertence and want of care and diligence and skill on the part of the said gang of men carrying said rail, and on account of the want of unity in their action in throwing the same.

Defendant denies that the method of loading said rails adopted by said McCormick was hazardous, and denies that the said plaintiff and his fellow-workmen engaged in loading said rail had no time for deliberation or concert of action, and denies that they acted under the sudden impulse created by the loud, violent, and profane language and commands of the said McCormick or by any language of said McCormick whatever, unless it should be in merely urging them in their work; and avers that all the dangers attendant upon the loading of said rails were well known to the plaintiff and his fellow-workmen, and that the said rail so injuring him was thrown by said workmen carelessly and in a negligent manner, and not by reason of any language or commands of said McCormick.

16 Denies that the said McCormick informed the said plaintiff and his fellow-workmen that the said train was approaching, and avers that the said train so approaching was in full view and plain sight and was easily to be seen and was seen by the said plaintiff and his fellow-workmen.

Defendant says it has no information sufficient on which to form a belief whether the sight of said train and knowledge that the same was coming had anything to do with confusing plaintiff and the others having hold of said rail; and denies that such information was communicated by any violent commands of the said McCormick so as to cause confusion to them or tend in any manner to make them less diligent and careful in the performance of their duty.

Admits that by reason of the haste and excitement of the said men the said plaintiff and his fellow-workmen did adopt an unsafe method to load said rails, to wit, in not acting in concert in throwing the same, but denies that such action was induced by the violent commands of the said McCormick, or by reason of the said McCormick departing from the usual mode and method of loading rails.

Admits that the plaintiff and his fellow-workmen did not act

with the necessary and proper deliberation and unity of effort, but denies that such failure to act with deliberation and unity was caused by any act of the defendant or of the said McCormick or any of its agents, servants, or employees.

Denies that the said rail so causing the accident was not thrown clear upon said car, but fell short thereof by reason of any act of said defendant or said McCormick.

17 Defendant denies that between said pile of rails and said flat car there was any railway ties placed there by the defendant lying in different and various positions; and this defendant avers that if there were any such ties in said place the difficulties in going over and through them were well known to the plaintiff and no objection was made by plaintiff respecting them.

Defendant further denies that said McCormick knew said freight train was overdue at Byers' station at the time he left the station with the construction train, and denies that it was overdue, and denies that the said McCormick knew the said freight train might at any moment meet said construction train.

Denies that plaintiff used all due care, skill, and attention possible under the circumstances in handling said rail by which he was injured.

Denies that he obeyed the sudden and violent orders of McCormick without himself being conscious of or reflecting or having time to reflect on the dangers to which he would be exposed by so doing; denies that plaintiff did obey or that it was his duty to obey the orders of said McCormick.

Denies that the plaintiff has suffered any injury by reason of the negligence of the defendant without any fault of his own, and avers that the sufferings and injuries of the plaintiff were caused by reason of his own fault and negligence and the negligence of his co-employees in the same employment.

18 Denies that the said McCormick could have had the said freight train stopped a few minutes or could have gone back with the said construction train to the side track at Byers' station and returned after the passage of the freight train; and denies that it was his duty so to do.

Denies that by reason of the said rail falling upon his foot and leg said plaintiff has suffered great bodily and mental pain and anguish or has suffered any loss whatever.

Denies that the plaintiff has in any manner been injured or damaged by any act or negligence of any kind or nature whatsoever on the part of the defendant.

(S'g'd) TELLER & ORAHOOD,
Attorneys for Defendant.

(Endorsed:) No. 1093. In circuit court of the United States. James Coyne, plaintiff, *v.* The U. P. R'y Co., defendant. Answer. Filed Dec. 19, 1883. (S'g'd) Edward F. Bishop, clerk. Teller & Orahood, attorneys for defendant.

19 And afterwards, and on, to wit, the 6th day of June, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Jury Trial and Judgment for Defendant.

JAMES COYNE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1093.

Action for damages.

At this day comes the said plaintiff, by W. H. Stearns, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And thereupon comes a jury, to wit: 1, J. H. Warner; 2, John Cumming; 3, L. C. Paddock; 4, Marshal Cook; 5, John Jackson; 6, C. B. Lucus; 7, M. B. Hyndman; 8, A. Leonard: 9, Alex. L. Cooper; 10, Fred. Jensen; 11, George W. Hertel; 12, Jessie Harris, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn, to well and truly try the issues herein joined and a true verdict render according to the evidence.

20 And the said jurors, having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find the issues herein joined for the said defendant.

21 And afterwards and on, to wit, the 5th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order for Bill of Exceptions to be Filed.

JAMES COYNE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1093.

Action for damages.

This day comes the said plaintiff, by W. H. Stearns, his attorney, and the said defendant, by Willard Teller, its attorney, also comes; and the said plaintiff moves the court to sign and cause to be entered of record a bill of the exceptions reserved at the trial in this cause, and the said defendant objects that the said bill of exceptions hath not been presented to the court in apt time or according to the rule and practice of the court.

Thereupon it is considered by the court that it be filed and entered of record in said cause, any rule or order of the court heretofore made to the contrary notwithstanding.

22 And afterwards and on the same day, to wit, the 5th day of December, A. D. 1884, came again the said plaintiff, by W. H. Stearns, his attorney, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein, and the said bill of exceptions is in words and figures as follows, to wit:

23 *Bill of Exceptions.*

In the Circuit Court of the United States for the District of Colorado.

JAMES COYNE, Plaintiff,

vs.

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Be it remembered that on the sixth day of June, A. D. 1884, the issues herein joined came on to be tried before the Hon. Moses Hallett, district judge, in the said court presiding, and a jury.

And thereupon the plaintiff, to maintain the said issues on his part, gave evidence tending to show that on and before the 18th day of May, A. D. 1882, plaintiff was in the employ of the defendant as a laborer or construction hand under one McCormick, construction boss or foreman of the said defendant; that said McCormick had authority to control and direct and compel obedience of the said plaintiff; also, in his discretion, to discharge the said plaintiff or any other servant of the said defendant working under his direction and control, and that on or about the day and year aforesaid, while so employed by the orders of the said McCormick, the said plaintiff, with the other servants and section men of the said defendant, went upon the construction train of defendant, which was then and

24 there and long before that under the control and direction of the said McCormick, to a place between two certain stations upon the railroad of the said defendant known, respectively, as Byers and River Bend, and about two miles east from the said Byers' station and at the place aforesaid the plaintiff and the other servants aforesaid were commanded by the said McCormick to load upon a certain flat car in the said construction train certain steel rails, forty in number, or thereabouts, which were then lying near to the track of said railroad; that plaintiff and the other employees of defendant aforesaid thereupon proceeded to load the said rails upon the said flat car as directed by the said McCormick, and under the orders and directions of the said McCormick, who was then and there directing the labor of plaintiff and the other said servants; that each of the said rails was of about the length of from 24 to 29 feet, and of the weight of from four to six hundred pounds; to lift either thereof the labors of about ten men were required, and said plaintiff and the said other servants, under the command of the said McCormick as aforesaid, were accordingly divided into two gangs of ten or more men each; that in loading the said rails each of the said gangs of men were required and directed by the said McCormick to act in concert and to first lay hold of and lift the said rail and walk with

the same to the said flat car and there halt, dress, and at the
25 word of command given by the said McCormick to life the said rail and cast the same with one motion upon the floor of the flat car.

The plaintiff also gave evidence tending to show that by reason of the length and great weight of said rails it was necessary in loading the same upon flat cars to avoid injury to the workmen engaged therein that care, deliberation, and concert of action should be observed, and that some person should give the word of command in each of the several stages of progress in loading the same, and particularly at the point where the rail was to be thrown upon the car; that prior to the injury complained of the said McCormick had controlled and directed the men in the loading of the rails, and that in loading the last rail, which hurt the plaintiff, he, the plaintiff, supposed the same course would be pursued by the said McCormick.

Plaintiff further gave evidence tending to show that neither at the said place nor nearer than Byer's station aforesaid was there any siding or switch; that when the said rails, save three or four, were loaded upon the said flat car the regular freight train of the defendant appeared, rapidly approaching from the east; that said McCormick thereupon, with violent oaths and imprecations, urged plaintiff and the other men of the said party to make haste and complete the loading of the said rails, so that he might move the construction train back to Byers' station aforesaid and out of the way of the said passenger train, and that by reason of the
26 great haste so commanded by the said McCormick and the confusion therefrom resulting plaintiff, who had before that time been and then was working and lifting at the end of the rail seized by the gang in which he belonged as aforesaid, was crowded off from the said rail; that the said McCormick, who was then and still, as before that, standing upon the said flat car, with oaths and violent language commanded plaintiff to lay hold of the other rail and not to stand idle; that thereupon plaintiff, in obedience to the commands of the said McCormick, rushed to and seized upon the rail being lifted by the other gang of men and moved forward to the said flat car, and, while plaintiff and the other men so holding the said rail were awaiting the word of command to lift the same, the said McCormick, with further oaths, imprecations, and harsh and violent commands, ordered the said party to get the said rail on in any way they could, not giving to them any word of command; and that thereupon the said party, hurried and agitated by the oaths and imprecations and violent commands aforesaid of the said McCormick, lifted without concert, some at one moment and some at another, and threw the said rail at one end with force and at the other end with less force, so that the same, being thrown by the said party, struck upon the side of the said flat car at one end and fell backwards; that plaintiff, seeing that the said rail was about
27 to fall, endeavored to retreat out of the way thereof, but in so doing was unable to avoid the falling rail, which fell on

plaintiff and bore him down, and broke and crushed plaintiff's foot and leg thereof.

Plaintiff further gave evidence tending to show that plaintiff had been in the service of the said defendant only about seven days; that at the time of plaintiff's going with the said McCormick to the place of loading the said rails the time at which the freight train of defendant would approach that place was well known to the said McCormick and was unknown to the plaintiff; that said freight train was overdue at said Byers' station at the time said construction train left said station as aforesaid, and said McCormick knew the fact of its being so overdue and knew that the said freight train was then coming towards said Byers' station from the east, and plaintiff knew nothing whatever about said freight train; that the injury so as aforesaid occasioned to the plaintiff was probably due and owing to the haste and confusion occasioned by the oaths, violent commands, and injunctions to make haste given by the said McCormick.

And thereupon the court instructed the said jury to find the said issues for the defendant; to which instruction of the court the plaintiff, by his counsel, then and there excepted, and the said jury thereupon gave their verdict, in accordance with the instructions
28 of the court, for the said defendant and against the plaintiff.

Be it further remembered that afterwards, to wit, on the twelfth day of June, A. D. 1884, at the same term of the court aforesaid the said plaintiff filed in the said court his motion for a new trial of the said issues in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Colorado.

JAMES COYNE, Plaintiff,

against

THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the plaintiff, by his attorney, W. H. Stearns, and moves the court to set aside the verdict, and for a new trial in said cause, because the court erred in directing the jury to render a verdict for the defendant.

W. H. STEARNS,
Attorney for Plaintiff.

Be it further remembered that afterwards, to wit, at the October term, A. D. 1884, of the said court, the motion of the said plaintiff for a new trial of the said issues came on to be heard and was argued by counsel, and thereupon the court overruled the said motion and refused to set aside the said verdict, but gave judgment thereon for the said defendant; and to this ruling and opinion of the
29 court in denying the motion aforesaid of the said plaintiff the said plaintiff, by counsel, then and there excepted.

And because these matters do not appear by the record herein, the plaintiff brings this his bill of exceptions, and prays that the same

may be signed and sealed and made part of the record herein, which is done accordingly.

MOSES HALLETT, [SEAL.]
Dist. Judge.

Endorsed: 1093. James Coyne *vs.* The Union Pacific Railway Co. Bill of exceptions. Filed Dec. 5, 1884. (S'g'd) Edward F. Bishop, clerk.

30 And afterwards and on, to wit, the 13th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment.

JAMES COYNE
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 1093.

Action for damages.

At this day it is ordered by the court that judgment be entered upon the verdict of the jury herein.

Wherefore it is considered by the court that the said defendant go hence hereof without day and have and recover of and from the said plaintiff its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 9th day of September, A. D. 1885, came again the said plaintiff, by E. L. Johnson, Esq., his attorney, and filed in said court and in said cause his bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, James Coyne, as principal, and Edward L. Johnson, as surety, are held and firmly bound unto the Union Pacific Railway Company in the full and just
31 sum of five hundred ($500.00) dollars, to be paid to the said the Union Pacific Railway Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at the October term, A. D. 1884, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between James Coyne, plaintiff, and The Union Pacific Railway Company, defendant, judgment was rendered against the

said plaintiff, James Coyne, and he, said James Coyne, having obtained a writ of error to reverse the judgment of the said court and a citation directed to the said The Union Pacific Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said James Coyne, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) JAMES his × mark. COYNE. [SEAL.]
EDWARD L. JOHNSON. [SEAL.]

Attest mark of James Coyne—
H. P. BENNET.

Approved:
MOSES HALLETT, *Judge.*

(Endorsed:) Gen. No., 1093. Circuit court of the United
32 States, district of Colorado. James Coyne, plaintiff in error, *vs.* The Union Pacific Railway Company, defendant in error. Bond, $500.00. Filed this 6th day of Sept., A. D. 1885. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

Writ of Error.

33 Writ of Error to the circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, between James Coyne, a citizen of the State of Colorado, plaintiff, and The Union Pacific Railway Company, a corporation existing and organized under the laws of the United States, a manifest error hath happened, to the great damage of the said James Coyne, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected,

the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

33½ [Endorsed:] Gen. No., 1093. Circuit court of the United States, district of Colorado. James Coyne, plaintiff in error, *vs.* The Union Pacific Railway Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 9th day of Sept., A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. E. L. Johnson, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado*, } *ss*:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States, at Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 18th day of September, A. D. 1885.

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

34 And afterwards and on, to wit, the 11th day of September, A. D. 1885, came again the said plaintiff, by E. T. Wells, Esq., his attorney, and filed in said court and in said cause his assignment of errors; and the said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES COYNE, Plaintiff in Error,
against
THE UNION PACIFIC RAILWAY COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, comes the said James Coyne, by

Ebenezer T. Wells, his attorney, and says that in the record and proceedings aforesaid there is a manifest error, in this, to wit:

That said circuit court directed the jury in said cause to find a verdict for the defendant in said cause; and in this, to wit:

That said jury having found its verdict for said defendant, said circuit court entered its judgment thereon in favor of said defendant.

35 And the said James Coyne prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment

EBENEZER T. WELLS,
Attorney for Plaintiff in Error.

(Endorsed:) 1093. Supreme Court of the United States. James Coyne, pl'ff in error, *vs.* The Union Pacific Railway Company, d'f't in error. Assignment of errors. Filed Sep. 11, 1885. (S'g'd) Edward F. Bishop, clerk.

Citation.

36 Citation, U. S. Circuit Court.

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to the Union Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein James Coyne is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, one of the judges of the circuit court of the United States for the district of Colorado, this 9th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

MOSES HALLETT, *Judge.*

37 [Endorsed:] Gen. No., 1093. Circuit court of the United States, district of Colorado. James Coyne, plaintiff in error, *vs.* The Union Pacific Railway Company, defendant in error. Citation. Filed in circuit court of the U. S. this 12th day of Sept., A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. E. L. Johnson, attorney for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

On this — day of ——, A. D. 18—, personally appeared —— ——, before me, the subscriber, a clerk of the — court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed before me this — day of ——, A. D. 18—.

—— ——, *Clerk,*
By —— ——, *Deputy Clerk.*

Service of within citation upon the defendant in error, The Union Pacific Railway Company, is hereby acknowledged this twelfth (12th) day of September, A. D. 1885, Denver, Colorado, by receiving a copy thereof.

TELLER & ORAHOOD,
Attorneys for Defendant in Error.

38 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the summons, amended complaint, answer, order, jury trial, judgment for defendant, order for bill of exceptions to be filed, bill of exceptions, order, judgment, bond, writ of error, assignment of error, and citation heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein James Coyne was plaintiff and the Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 19th day of September, A. D. 1885.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Endorsed on cover: Colorado C. C. U. S. No. 308. James Coyne, plaintiff in error, *vs.* The Union Pacific Railway Company. Filed September 25, 1885.

—IN THE—

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1887.

JAMES COYNE,
Plaintiff in Error.

vs.

THE UNION PACIFIC RAILWAY COMPANY,
Defendants in Error.

ARGUMENT AND BRIEF FOR PLAINTIFF IN ERROR.

It appears by the bill of exceptions that the injuries suffered by plaintiff in error were probably due to the hurry and confusion occasioned by the oaths, violent commands and injunctions to

make haste, of McCormick who was the conductor of the construction train, and foreman of the construction gang to which plaintiff in error belonged.

The evidence makes a clear case of negligence on McCormick's part, imputable to the defendant company unless he was a fellow-servant of plaintiff.

The Court below taking the view that the relation between them was that of fellow-servants, directed the jury to find for the defendant. In this, we think that the Court erred.

I.

The very facts which show that McCormick was guilty of negligence, shows also, we think, that he and plaintiff stood in very different relations to the company, and were not fellow-servants.

1. McCormick knew that the regular freight train was approaching Byers station from the East; that it was behind its time; that he was exposed to meet it if he moved his construction train eastward; that there was no side track between Byers and his point of destination; and that his train, occupying the main track, would be compelled to return to Byers to avoid the other.

These things McCormick knew, and plaintiff did not know them. McCormick knew them because it was his duty to know them; he was bound to inquire and be informed concerning them. Plaintiff was ignorant of them because it was not his business to know them, and it would have been deemed

impertinence on his part to inquire about them, as if by right or otherwise than out of curiosity.

2. McCormick moved his train out in the face of the approaching freight train, and by his order plaintiff and his companions went upon the train. Plaintiff might have cracked his lungs in the vain attempt to cause the train to move; it would not have stirred at his bidding. Had he assumed to direct his companions or control their actions, their derisive laughter, not their obedience, would have greeted his effort.

3. Arrived at the place of work, McCormick ordered his train to stop, ordered his men to load the rails upon the flat car; remained upon the car and thence directed and overlooked their labor.

How absurd plaintiff would have appeared to his companions had he ventured to dispute with McCormick his seat of ease and command, had he ordered the latter to join the workmen below, while he, plaintiff, should give the word of command from above.

4. The critical moment arrives; the freight train is heard approaching. Two lines of action are now open: either the construction train may move at once back to Byers, go upon the side track, allow the other train to pass, then return and complete the loading of the rails in the safe, orderly manner thus far pursued; or by hurry, imprecations and violence, and a total disregard of order and safety, the work may perhaps be completed before moving the train, without loss, if good fortune so

will, of life or limb. Now to whom is this choice offered? Who determined to run all the risks attendant on the dangerous course, hoping for the best?

The plaintiff, perhaps, with McCormick and his twenty other nameless *fellow-servants* in council? Surely not. McCormick alone weighs, resolves and commands; the plaintiff and the others unhesitatingly obey. McCormick imposes this lottery of life and limb upon his men. All are equally exposed to the peril, but the actual and very grievous harm falls to plaintiff's lot.

The series of occurrences which created the dangerous situation out of which plaintiff's injuries arose, seems therefore to establish both McCormick's negligence and his character of vice-principal of the company.

One mark of authority, and of the character of vice-principal McCormick possessed, says our record, which indeed he had no occasion to use on the day in question, but to which the courts have generally attached much importance. He had the power (presumably to employ men, and also certainly) to discharge any of the men working under him from the service of the company; a power vastly more important than that of employment. The latter may be, and frequently is, given to general employment agencies in no way connected with the operations of the railway company's lines: but to dismiss one, already in the company's service, seems to be so direct and capital an exercise of con-

trol over the principal's business that it is always enumerated among the distinctive badges of the vice-principal.

Wearing all these *indicia* of authority and superiority, how can McCormick be considered as any less than a vice-principal? If the entire body of the company's officers and directors had been present in person, what greater authority could they have used, and with what greater right, than McCormick used from the moment he ordered his construction train to leave Byers to the moment plaintiff was crushed under the rail and maimed for life?

We think that thousands of unfortunate employees have suffered incalculable loss, to the great discredit of a law that surely is designed to be humane, because the word "vice-principal" has so frequently been accepted by the Courts *extensive* instead of *intensive*. This cannot but be error. It offends the common understanding of the layman, and it has proved a source of great difficulty to those judges who have endeavored to illuminate their decisions upon the question by the reason of the law. It cannot but be,—reason demands it,—that the rank and value of delegated authority is to be measured and determined by its degree, its quality, not by its mere extension, its quantity. Plaintiff's contract of service with the company bound him to obey McCormick; to enforce this duty of plaintiff the company clothed McCormick with the authority to discharge plaintiff. The reciprocal obligation of the company to plaintiff is clearly, that McCormick shall exercise his authority as prudently and care-

fully as the company would be bound to exercise the same by whomsover of its agents or officers or howsoever most personally present.

It has been sometimes argued that public policy favors the more restricted liability of the company, upon the theory that employees will be more careful in the discharge of their respective duties if assured that they will have no recourse against the company in the event of their suffering injury through the negligence of any one engaged, in whatever capacity, in the same general work with themselves. It may be argued with much better reason, that public policy, which is public interest, favors a safe and efficient railway service; that to this end the vast body of men engaged in the handling of "the dangerous and powerful agency of steam," should be under a discipline as rigid as that of an army in the field or of a ship's crew at sea; and that the great elements of discipline, that is, prompt and intelligent action, and a willing, unquestioning obedience, will be best grounded in the assurance of the employee that authority goes hand in hand with responsibility, and that the company which speaks to him in the person of his immediate superior, also warrants him against the consequence of that superior's want of care and caution.

This case seems to come within both the decision and the reasoning of this Court in the case of Chicago & Milwaukee Railroad vs. Ross (12 U. S. Rep. 377). McCormick was the conductor of the construction train and foreman of the construction gang of twenty or more men. Adopting substantially the language of this Court (case just cited,

page 390) we say, that he was clothed with the control and management of a distinct department in which his duty was entirely that of direction and superintendence. He had entire control of his construction train, and of the twenty or more men who were working under him. If he did not represent the company, then that construction train was operated, and that entire band of men was directed in its work, without any representative of the company. The company created the relation of superior and inferior between McCormick and plaintiff; and they were not, within the reason of the law, fellow-servants engaged in the same common employment.

The language of the Supreme Court of Nebraska, (Cobb, Ch. J., *loquente*,) describes aptly, we think, and concisely, *mutato nomine*, the relation existing between plaintiff and McCormick: "The "(plaintiff) was in the employment of the railroad "company in the lowest grade of service, a day "laborer. To him (McCormick) represented the "company with all of its authority and power. It was not for him to question the propriety or timeliness "of any order coming from this source, unless its "execution would carry him into palpable physical "danger."

"(The negligence on the part of McCormick) "was negligence on the part of the railroad com-"pany, whose vice-principal he was, and which "could alone discharge its duty to this employee, on "this occasion, through him."

(1884.) C. S., etc., R. Co. vs. Lundstrom, 16 Neb. 254, (259).

Again. the language of Ranney, J., in (1854) Railroad Co. v. Keary, 3 Ohio St. 201. (211), well describes both the actual and legal position of McCormick, standing upon the car, not himself taking part in the work, but directing the workmen: "His will alone controls everything, and it is the "will of the company that his intelligence alone "should be trusted for this purpose.

"This service is not common to him and the "hands placed under him. They have nothing to "do with it. His duties and their duties are entirely "seperate and distinct, although both necessary to "produce the result. It is his to command, and "theirs to obey and execute. No service is common "that does not admit a common participation, and "no servants are fellow-servants when one is placed "in control over the other." We cite the following recent decisions in support of our position, that plaintiff and McCormick were not fellow-servants, but that McCormick was a vice-principal for whose negligence the defendant company is responsible:

Cunard Steamship Co. vs. Carey, 119 U. S. 245.

(1884. Va.) Moon vs. R. & A. R. R. Co. 78 Va. 745 (pp. 749-50.)

(1885 Mo.) McDermott vs. Hannibal etc, Ry Co., 87 Mo. 285 (p. 294).

(1886 Neb.) B. & M. Ry Co. vs. Crockett, 19 Neb. 138 (p. 145).

(1886 U. S. C. Ct. S. D. N. Y.) Mason vs. Edison Machine Works, 28 ed. Fed. Rep. 228.

(1884 Ill.) Chicago and A. Ry Co. vs. May, 108 Ill. 293.

(1887 Ill.) Wabash, etc., Ry. Co. vs. Hawk, 12 N. E. Rep. 253.

(1887 Kansas.) Missouri P. Ry. Co. vs. Peregoy, 14 Pac. Rep. 7.

We think that the negligence of McCormick may be well held to be that of the company, under the rule which requires the master to furnish to his servant a safe place and safe instrumentalities for his work; since the entire series of concurring agencies out of which the plaintiff's injuries arose formed at the same time the complexus of circumstances which were nothing else than his work-place and the instrumentalities of his work. But we do not desire to argue at length, while not waiving the benefit of, this view. We hope that the great authority of this Court may finally incline the balance of justice, if still uncertain, to the side of those decisions, less numerous but better reasoned, which may be brought under recognized principles of law and commend themselves to men's common sense of right.

Denver, Nov. 22, 1887.

EDWARD L. JOHNSON,
E. T. WELLS,
For Plaintiff in Error.

Office Supreme Court U.
FILED.
JAN 30 1890
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1889 No. ~~46~~ 8

JAMES COYNE,

Plaintiff in Error,

against

THE UNION PACIFIC RAILWAY COMPANY.

NOTES OF

ORAL ARGUMENT FOR THE RAILWAY COMPANY,

DELIVERED BY

JOHN F. DILLON,

ON THE QUESTION OF THE EMPLOYER'S LIABILITY IN FELLOW-SERVANT CASES, IN THE SUPREME COURT ON JANUARY 23d and 24th, 1890.

C. G. Burgoyne's Printing Business, Cor. Walker and Centre Sts., N. Y.

Argument of John F. Dillon on question of Employer's Liability in Fellow-Servant Cases.

COYNE

AGAINST

UNION PACIFIC RY. CO.

In Supreme Court, United States.

January 23, 24, 1890.

Notes for Oral Argument.

MAY IT PLEASE THE COURT:

THE CASE is stated in my printed Brief (pp. 2, 3), to which I refer, and which I have already outlined to the Court. It is shortly, that a workman standing on the ground engaged with other workmen in loading rails on a flat car was injured by an alleged negligent order of the boss of the gang of hands (which included the plaintiff,) thus employed.

The record in this case especially in view of the conflict of certain State Court decisions and the diversity of opinion among the members of this Court upon some points connected with the general subject which it presents, has seemed to me to require a careful and searching examination of the state of the law in this country concerning the liability of employers. For the business

of this hour we need not a microscope, but a field glass and a commanding height.

To an adequate view of the liability of employers to one servant for the negligence of another servant in the same common employment, it is material to recall at the outset the law relating to the master's liability to the public at large, that is, to strangers or persons not in his employment, for the faults of his servants. The reason therefor is that an inconsiderate impression has more or less obtained and exists that the same legal principles as to the master's liability ought to apply to cases of injuries by a servant to a co-servant, and to cases of injuries by a servant to strangers or to the public. There is not the slightest ground for any liability in the present action on any other principle. Slight reflection, however, will show that the two cases are entirely different in their nature, and therefore that they require the application of different legal principles. The rules of law as to the employer's liability to one servant for the default of a co-servant not only are, but in my judgment they ought to be and to remain, different from those relating to the master's liability to persons not in his employment, for the acts of his servants. It is as I shall endeavor to show, a mistake to suppose that the existing law as to fellow servants is an "*exception*" to the general rules of law as to the master's liability. It has, without consideration, been sometimes thus characterized and criticised. But it is not an exception; it is itself a general rule applicable to a different relation. I have satisfied myself that the general doctrines of our jurisprudence making as to the extent of the master's liability a difference between the public and co-

servants, are essentially right and sound; that at all events any attempt, oblique or avowed, expressed or silent, to change the "well settled doctrine" as to the master's liability in fellow servant cases by judicial legislation, whether based upon the notion that the law on this subject as it stands is not just, or upon the notion that it is within the rightful judicial competence of the Courts and least of all of this Court to change it, has no reasonable and solid ground upon which to rest.

I.

Concerning the Master's Liability to Strangers or the Public.

By our law the master is liable to persons not in his service, not only for his own wrongful acts and omissions, but for the wrongful acts and omissions of his servants in the course and scope of their employment as such, even although the particular acts or omissions were unauthorized or even forbidden by him, and resulted in damage and loss to him, aside from the claims of the person injured.

Singer Mfg. Co. vs. Rahn, 132 U. S., 518, 523, and cases cited by GRAY, J.

So far as this rule imposes on the master a *vicarious and imputed liability, i. e.*, a liability beyond his authorized acts and defaults, namely, a liability for faults and omissions of his servants which he did not approve authorize or direct, but even forbade, it is one of manifest severity, not based on natural justice and is justi-

fied and justifiable only on grounds of public utility or of social duty. This doctrine is itself an exception to the rule of natural justice which makes a person liable only for what he does or authorizes. It rests on no statute. It cannot be shown to be over 200 years old in the English law. It is broader in its scope and greater in its severity than the law of continental Europe

As to wrongful acts which the master did not *authorize* the rule does not rest, as Mr. POLLOCK (Essays Jurisp., p. 117) points out, on the idea of agency. *Qui facit per alium facit per se.* For if done in the scope and course of the servant's employment, the master is liable even though he forbade the particular act—*e. g.*, forbade his servant to drive at rapid rate, who nevertheless disobeys and runs down another.

"*Respondeat Superior*," expresses, says POLLOCK (Essays Jurisp., p. 118) a legal result, not its *rationale.* It assumes that the master is responsible and merely expresses such responsibility.

The *hardship of general rule* has been often felt. "We never apply this rule *(respondeat superior)* without a sense of its hardships on the master." Shea vs. Reems, 36 La. An., 966–969. SHARWOOD, C. J., says. "To visit a man with heavy damages for the negligence of a servant when he is able to show that he exercised all possible care and precaution in the selection of him, is apt to strike the common mind as unjust." Hays vs. Millar, 77 Pa. St., 238.

The grounds and reason of the rule of the master's liability to the public bear directly on the question raised by the record, and therefore I refer to them. They are these:

The master's business is as respects the public conducted for his own profit and convenience, the public

have no concern in it, are not consulted about it, have no control over it or its methods, and if that business is a lawful one, as, for example, a railway built and operated under legislative authority, the master while he is not bond to *guarantee* the public against accidents or damage, is bound to take *reasonable care* either by himself or those servants who represent him to prevent accidents and damage, and he is liable for his servants' negligence, not because they are his agents or servants, but because as respects the public he is bound to conduct his business or undertaking with due caution not to injure others. The intelligible ground of the master's liability to the public is this: that the master having for his convenience, pleasure or advantage exposed the public to risk of damages, if damage happens by his fault or that of his servants, the master must make it good.

For Chief Justice SHAW'S ground of this doctrine as stated in Farwell's case; see

Pollock on Torts, p. 67.

"This (Chief-Justice SHAW'S) is a more lucid statement than I have been able to find in any English book."

Pollock, Essays on Jurisp., p. 127.

Accordingly this Court per GRIER, J. (R. R. Co. vs Derby, 14 How., 468, 485), says: "The master's liability," *i. e.*, to the public "is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master."

This exceptional burden on the employer is imposed by the policy of the law to protect the public who as I

have just said, have no concern in the master's business, do not consent to its being carried on, who do not control its modes or methods, who reap no profit from it, who have no means of self-protection, but who are nevertheless exposed to risk of damage by it; and whether it is conducted by the master himself or by his servants is to the public of no consequence whatever.

If I am injured while travelling on the street by the falling of a wire charged with electricity or by the fall of a rotten telegraph pole, will it be said that the case is the same as if I had been employed with others to work with such wires or poles and had been injured in the ordinary course of such employment by those under or with whom I was voluntarily serving? The cases are radically different. The same difference exists between the case of passengers and servants. The servant with full knowledge of its character and risks enters the service of his own free will for his own advantage, in a matter which, as respects the performance of the service, becomes his as well as the employers. It would not be just, I submit, to extend to the case of ordinary injuries by one servant to another the abnormally severe common law liability of the master for injuries by his servants to persons not in his employment.

Tis brings us—

II.

To the employer's liability in respect to what is usually called "the common employment" or "fellow servant cases."

I will not weary the Court by any profitless learning on this subject. I shall refer to it only so far as is essential to see with clearness the final shape it long since assmued in the English and American jurisprudence. So much misconception prevails that it is necessary to take an observation, to see where we are, and to this end it is needful briefly to trace the definite settlement our law on this subject and the grounds on which it rests.

This has a direct bearing on the case presented by the record, since if I am not mistaken it will solve every difficulty in the way of judicial judgment in favor of the defendant company.

In **Priestly vs. Fowler,** 3 M. & W., 1837, p. 5, it is said: "It is admitted that there is no precedent for the present action by a servant against the master." Action was by servant against master for not using due care to provide safe and suitable van, by the breaking down of which the plaintiff was injured. Motion in arrest and judgment arrested. But as this is not, as this Court has said, "a fellow-servant case at all," I pass it without comment.

South Carolina Case:

Murray vs. S. C. R. R. Co., 1 McMullan, 385, **1841:**

The plaintiff was a fireman, and was injured by the

alleged carelessness of the engineer of the same train, whose general fitness was not questioned (he was, in fact, selected by the plaintiff as the one he wished to serve under) in not stopping the engine (a horse being upon the track) as soon as he was cautioned; it being contended by the plaintiff that if this had been done the engine could have been stopped before it reached the horse. The engineer, in the exercise of his judgment, thought that the only way to avoid the injury, as the horse was approaching the road obliquely in the direction the engine was going, was to let on the steam and to outrun the horse, and thereby avoid it. The engine struck the horse and caused the injury to the plaintiff. He sued the company. The jury found a verdict for the plaintiff for $1,500. The Court of Errors, assuming that the engineer was, as the verdict had found, negligent, nevertheless held that the company was not liable—six judges uniting, three dissenting.

THE GROUND *of the Court's judgment was,*

That several persons were employed by their joint efforts to effect a single object—the running of the train, that there is a difference between the company's liability to passengers and to servants; *that the plaintiff knew that he was to* WORK IN CONCERT WITH OTHERS *and under the control of the engineer; that "he assumed the usual and ordinary risks of his employment"* (the dissenting judges admitted this, p. 403). And the exact point in dispute was whether "it is incident to the contract of service that the company should guarantee the plaintiff against the negligence of company's co-servants?" (See p. 400). It was held that it was not.

"It is admitted that no case like the present has been found" (p. 398). It is really the first "fellow servant case" or "common employment case," so-called to be found in the English or American reports. But this only proves that not until 1841 had it been sought to make the master liable to one servant for the neglect or fault of a co-servant in the same service or employment. Will this Court adjudge that "it *is* incident to the contract of service in 1890, that the company guarantees one servant against the negligence of the company's co-servants?" I submit to your honors, that if this precise case of Murray were now before you *res nova*, you would give the same judgment with scarcely a change in reasons for it.

Farwell's Case.

Farwell vs. Boston and Worcester R. R., 4 Met., 1842, is the basis of the existing common law of England and America.

An engineer was injured by the negligence of the switchman who left the switch open so that the engine run off the track and injured the plaintiff. The switchman was a careful and trustworthy servant.

The engineer (Farwell) sued the Company.

HELD that he could not recover.

No actual negligence was alleged against the Company. The basis of the claim was a supposed implied contract by the master to pay one servant for the damages caused to him by the negligence of another servant. HELD by the Court that there was no such implied contract (*Ib.*, p. 56). On the contrary, said Chief-Justice SHAW for the Court (*Ib.*, p. 60),

"the implied contract of the master does not extend to

indemnify the servant against the negligence of any one but himself; he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, expressed or implied."

This is right in substance, but a modern jurist would probably prefer to say that the relation was one wherein the duties and liabilities of the parties were fixed by the law.

The plaintiff's counsel urged in Farwell's case that although this conclusion might be correct if the servants (engineer and switchmen) were employed in the *same department* of duty, yet it is not so where, as in that case, the one servant can in no degree control or influence the conduct of the other. But the Court answered that the contract of the master, *i. e.*, his legal liability, did not extend to indemnify the engineer for the default of the switchman. They were both in a common service (*Ib.*, p. 60).

This case is, as is well known, the fountainhead of the common law of England and America on this subject, except so far as it rests on antecedent and immemorial usage. And now I put it to your Honors whether, if *Farwell's case* were before you, *res integra*, with all the advantage of the innumerable decisions in the long procession of cases which have followed, you would yourselves pronounce a different judgment? Let me stop pausefully here for one instant, sensible as I am of the exceeding value of every moment of your Honor's time, and pay a passing tribute to the illustrious Judge who delivered the judgment in Farwell's case.

We all know that the wisdom of the most enlightened

and sagacious of legislators and judges can at the utmost but light up but a small and circumscribed space, and that it is not within the limited capacity of the human intellect to excogitate and to formulate in advance with the requisite precision rules which shall be exactly adapted to new and untried relations and unanticipated circumstances. Chief Justice SHAW did not in this instance, or ever, attempt any such impossible work, but his true claim to greatness and to reverential regard and admiration is that when the relation and circumstances arose and were actually presented for judgment, even for the first time, he saw through them to the very bottom; his mind took in and his sound judgment weighed every consideration that pertained to it. His is indeed one of the few immortal names in our law "that still rule us from their urns."

It is a most remarkable fact that the doctrine of Farwell's case has never been judicially denied in Great Britain, and never in substance in America. It is even recognized by the English Employers' Liability Act of 1880, which simply enacts certain specified and limited exceptions to it. Except in Tennessee, no American Court has wholly denied it. Two or three Courts, principally Ohio and Kentucky, have excepted from it certain cases. GRAY, J., in 109 U. S. 484, cites the cases and says only two had denied Farwell's case, and one of those had been overruled. There is not to-day an American statute that wholly abolishes as to all employers the defense of "common employment."

While three or four State Legislatures have abrogated it as to Railroad Companies, they leave it in

full force and operation as to all other employments, companies and persons.

Harvard Law Review, December 1888, gives the English and American legislation to date; p. 212 *et seq.* An examination of this legislation will show its diversity, and will convince the Court that it is a subject to be dealt with, if at all, by the Legislatures and not the Judicial Tribunals, whose rules must be general, and cannot be restricted or partial.

In **Howard vs. Denver, &c., R. G. R. Co.,** 25 Fed. Rep., 837, 1886, before BREWER, J., it appeared that a fireman was killed by negligence of an engineer of another train; *Held*, fellow servants following Farwell's case.

BREWER, J.:

"The principles in Farwell's case may not be obviously and unquestionably correct; they may be ere long entirely overthrown. But if overthrown it should be by legislative action and not by judicial decision. The true path for judicial walk is, as I conceive, *super antiquas vias.*"

I doubt whether this prediction will be fulfilled; Farwell's case may be limited by the Legislature, but its general principle rests on reason and the nature of things and will remain. I cannot, however, doubt the soundness of the utterance that after fifty years of almost universal acceptance it has become incorporate into our general common law as it has into the common law of Colorado and that it is not within the rightful competency of the Judicial Power either to overthrow or to substantially change it.

I asked a moment since whether your Honors thought Farwell's case was unsound or wrongly decided.

Your judgment on this point is not a matter of conjecture. Curiously enough forty-one years afterwards, Farwell's case was exactly reproduced in the case of Randall vs. B. & O. R. R. Co., 109 U. S., 478, 1883, and it was *unanimously* decided by this Court in the same way—at all events there appears no expressed dissent. It is immaterial whether you decided this on principle or precedent.

ALLEGED REACTION AGAINST FARWELL'S CASE. (DOYLE'S BRIEF, P. 16) IS INCORRECT.

1. LEGISLATIVE CHANGES are slight and create only few exceptions to general doctrine. They leave the general doctrine otherwise intact.

Harvard Law Review, supra.

2. JUDICIAL CHANGES are chiefly *the eccentric decisions of Ohio, Kentucky and Tennessee.* Whoever studies them and the effect of trying to apply them as shown in the judicial decisions of those States will pause long before adopting them. I confess my inability to understand them or the condition in which they have placed the law of those States.

Liability of master to servants for injuries received in the course of the common employment in its settled form and expression.

Settled doctrine and its rationale, according to the later English authorities, and the judicial judgments in this country and *in this Court*, is this:

"That the servant must be presumed, in entering on

his employment, to take all ordinary risks of it, including risk of accidents happening by the neglect, acts or omissions on the part of other persons (servants) engaged in the same undertaking" (Prof. POLLOCK'S Essays on Jurisp., pp. 127, 128; pp. 131-133; Lord CRANFORTH, my Brief, pp. 4, 5; Pollock, Torts, 85, citing ERLE, C. J.; *Same view*, FIELD, J., my Brief, p. 4; HARLAN, J., 100 U. S., p. 217; GRAY, J., 109 U. S., 483).

This is not, at this day, a new, strange, nebulous doctrine, dimly seen and struggling for recognition, but one which has now been so long recognized, established and "settled" (this is the word used by this Court) as to have become fixed in English and American jurisprudence. It is part of the law of Colorado, whence this cause comes.

Great as the rightful jurisdiction of this tribunal is, however august and imperial its scope, it is, nevertheless, strictly a *judicial* tribunal to administer and not to change the principles, rules, doctrines and usages which constitute the general body of the jurisprudence of the several communities over which its territorial jurisdiction extends. You must, in the absence of the statute, decide this case from Colorado the same as if it came from New York. In Colorado there is no statute changing the rule and the general rule exists in that State.

N. Y., &c., Co. vs. Rogers, 11 Col., 6.
Wells vs. Coe, 6 Col., 159.

If the people of Colorado shall become dissatisfied with it they can limit or modify or abrogate it as they deem wise and suited to their local conditions. State

policy will, doubtless, differ on this subject. Will this Court force a change upon them?

This general doctrine of "common employment" is not open to question in this Court.

It has been repeatedly declared.

See my *Brief, pp. 4, 5* for cases.

FIELD, J., in Northern Pacific vs. Herbert, 116 U. S., and in Ross Case, 112 U. S., p. 382.

GRAY, J., Randall's Case, 109 U. S., 483.

HARLAN, J., Hough's Case, 100 U. S., 217.

There are other cases to the same effect.

In this forum the real question, *What is the law*—the settled law on the subject of the employer's liability to servants?

The common law does not make the defendant company liable, and I am clear that the rules as heretofore laid down by this Court, in the cases relating thereto, do not include a liability on the part of the defendant company for the negligence of McCormick here complained of; and, even if the question were *res integra*, and one of first impression, I further insist that such a liability under the facts and circumstances of this case ought not to be declared or adjudged. It cannot be declared or adjudged by anything less than a legal revolution in our jurisprudence.

III.

The law in this country as it stands holds the master to a full measure of responsibility to his servants.

THE MASTER OWES CERTAIN DEFINED PERSONAL, INALIENABLE, NON-ASSIGNABLE DUTIES TOWARDS SERVANTS. *No single apt word:*—these personal duties may be devolved by the master on others, but not *without recourse* on him. They are like covenants that run with the land, in that liability indissolubly attaches and inheres with respect of these duties, whether they are undertaken by the master in person or by others by delegation from him. What these defined personal duties are, as shown by the decisions of this Court, is pointed out and illustrated by the cases cited in my Brief (p. 6).

Rules as to master's liability in this Court; see my Brief, p. 6, and cases there cited.

For list of principal cases in this Court see APPENDIX HERETO.

English law different in this: that in the law of England the master can *only be held for his own personal negligence* and never for the negligence of a fit and competent servant, no matter what his grade or duties may be, resulting in the hurt of a co-servant in the same service.

Pollock, Essays, p. 131.

This defect in the English law led to the specified modifications contained in the Employer's Liabiliay Act of 1880. The necessity for any such act in this country

is largely done away with by the decisions of this Court, holding that the master cannot (as he could in in England) escape liability in respect of his personal duties (specified on p. 6 of my Brief) by handing over the performance of such duties to officers or servants.

In the further discussion I shall call such duties, for short, the *personal duties* of the master.

For fault or negligence in the discharge of these *personal duties* of the master resulting in injury to his servants, the master, under the decisions of this Court, is liable whether he acts in person or by other servants who represent him in respect thereof.

In such cases, inasmuch as the servant whose fault causes the injury is *legally identified* with the master, such servant is not the fellow-servant of the injured servant, and their employment is not "a common employment" within the rule under consideration.

Hough's Case, 100 U. S., at p. 217 (Opinion by HARLAN, J.), exactly and forcibly illustrates this.

See my Brief, p. 8.

The doctrine of VICE-PRINCIPAL. The above constitutes what is sometimes called the doctrine of Vice-Principal, by which is meant that the employer commits the entire charge of his business as a mine or a factory, or of some distinct department of it to a deputy master, a vicar, a general manager or superintendent, who is the master's actual representative—his *alter ego*—his vice-principal, who personifies him, and whose fault causes an injury to a subordinate employee; here such general manager or superintendent or vice-principal, since he is the *personal representative* of the master in respect

of the master's *personal duties* towards his servants is not a fellow-servant with the servant who is injured by his fault, and in such cases the employer is liable, provided the fault is one that relates to what I have called his personal duties towards his servants; but not otherwise.

In this category, according to the majority's view, falls *Ross' Case*, 112 U. S., where the conductor with supreme power and sole direction over the train, and whose gross carelessness caused the collision which produced the injury, was as to this matter, *under the circumstances*, held to be the personal representative, the vice-principal of the company, for whose fault the company was liable to injured engineer.

The doctrine that a deputy master or vice-principal is not a fellow-servant is not a doctrine of the English law.

Smith on Master and Servant, 257.

But, on the contrary, such a doctrine is there rejected.

Such a principle was apparently assumed in Murphy vs. Smith, 19 C. B. N. S., 361 (cited Brief, p. 12), but was exploded by judgment of the House of Lords in the great case of *Wilson vs. Merry*, 1 H. L. Case Sc. App., 326, 1868.

So held in Howells vs. Landore Steel Co., L. Rep., 10, Q. B. 62, 1874, where the company was adjudged not to be liable for death of a miner by explosion of fire damp caused by the negligence (as the jury found) of one Thomas, the manager of the mine.

COCKBURN, C. J., says: "I cannot say that Thomas

was here anything more than a vice-principal or manager, *and he was, therefore, a fellow servant.*"

BLACKBURN, J.: "The decision in the House of Lords (Wilson vs. Merry) is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the matter for his negligence as regards a fellow servant."

SMITH, Master and Servant, p. 257, says:

"It has been repeatedly held in England that a foreman cannot be looked upon as a deputy master, 'vice-principal or *alter ego*' (citing many cases). And the same would now be held in Scotland" (citing Wilson vs. Merry).

When the House of Lords settled the principle in Great Britain and rested it on the ground above stated (see *supra*, p , approved by this Court in the cases above cited, both in substance and form), the doctrine that "grades" in the service or "different departments" in the service made any difference in the question of the master's liability was rejected by the English Courts.

IN THE AMERICAN LAW AND IN THAT OF THIS COURT AS I UNDERSTAND IT, THE DOCTRINE OF VICE PRINCIPAL exists to this extent and no further, viz.: that it is precisely commensurate with the Master's personal duties towards his servants; as to these the servant who represents the master is what we may call a vice-principal for whose acts and neglects the master is liable. Beyond this the Employer is liable only for his own personal negligence. This is a plain, sound, safe and practicable line of distinction. Any attempt to refine based upon the notion of "grades" in the service or, what is much the same thing, "departments" in the service (which departments exist only in the imagination of

the judges and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose Courts have constructed a labyrinth in which the judges that made it can "find no end in wandering mazes lost."

IV.

FUNDAMENTAL AND CONTROLLING PROPOSITION.

There is no liability on the part of the company in the case at the bar, because there was no neglect of any of the PERSONAL DUTIES of the Master; it is no part of the duty of the Master, whether he be a manufacturer of rails or carrier of them or a railway company owning them, to load them in person or to direct any particular mode of loading them. As the Master in the case at the bar furnished a fit foreman, safe appliances and sufficient help to do the work, he fulfilled his whole duty. The risk that McCormick might give a faulty order was one of the risks that the plaintiff assumed in entering on the service with McCormick. The work of loading rails was as between Coyne and McCormick "a common employment," although their grade in the common service was different, and McCormick had the

power to discharge servants under him and to control the mode of doing the common work. McCormick was not as to the work of loading rails a Vice Principal because the duty of loading these rails was not one of the personal duties of the Master.

My Brief, p. 11.
English rule, Pollock on Torts, 88.
My Brief, p. 23.
American rule, stated and illustrated.
My Brief, p. 11.

The case at bar falls precisely within the principle so clearly stated in the case of *Northern Pacific R. R. Co. vs. Herbert*, 116 U. S., 642, 647:

"The general doctrine," says FIELD, J., "as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow-servant in a common employment, is well settled. *When several persons are thus employed, there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes* THAT *risk, and, if he should suffer, he cannot recover from his employer.* He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion, 'He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.' *Chicago and Milwaukee Railroad Co. vs. Ross*, 112 U. S., 377, 383."

The words it italicized cover the case at the bar exactly. It is not a question of "grades" or "departments in the service, but simply the question whether the risk of injury by reason of McCormick failing" in the care and vigilance essential to Coyne's safety, was

not a risk which Coyne "assumed in undertaking the service." If this case is not within the "well-settled doctrine," what case would be?

What risk more obvious than that Coyne might be hurt by a falling rail? What risk more obvious than that McCormick might commit some error of judgment in executing the common work? This action professes to be one based on the negligence of the defendant company. *But what negligence?* It is, in fact, based upon the proposition that the company warrants McCormick's infallibility and guarantees the workmen under him that he will be guilty of no negligence to their hurt. If, as the plaintiff claims, Coyne and McCormick were not "fellow servants" in a "common employment," then if Coyne's negligence or that of his fellow workmen had hurt McCormick, the company would for such negligence be liable to McCormick; such is the necessary result of the plaintiff's position, and it demonstrates the unsoundness of that position—its absurdity. For it is absurd except on the ground that the doctrine of common employment has no existence, and that the master's liability *to* servants is as broad as his liability to the public *for* them.

McCormick not a vice principal.

My Brief, p. 12. *Wells' Brief, p. 4,* puts plaintiff's case on the sole ground that McCormick was a vice-principal.

Illustrative Cases in Point against the Proposition that McCormick was a Vice-Principal:

McCorker's case (N. Y. Court of Appeals),
My Brief, p. 13.

This is in point and affords a clear illustration of the true doctrine.

Brick's case (N. Y. Court of Appeals),
My Brief, p. 14.

Where general foreman of construction train was held not to be a vice-principal, but fellow servant.

Coughlin's case,
My Brief, p. 25.

This case is a very clear illustration of the settled rule.

Hussey's case, A. D. 1889 (N. Y. Court of Appeals),
112 N. Y., 614, p. 620.

On "all fours" with the case at the bar.

Indiana Case:
Brief, p. 19.

Massachusetts:
McKinnon vs. Norcross, 148 Mass., 533, 1889, and cases cited. Case analogous to the one at the bar.

Minnesota:
Lindvall vs. Woods (Minn., 1889), 42 N. W. Rep., 1020.

I cite these now because they are late cases, and "foreman" cases. Many others might be added.

GRAY, J., cites many, 109 U. S., p. 484.

"Fellow Servants"—"Common Employment."

Wilson vs. Merry, L. R., 1 House Lords Scotch App. Cases, 326, 1868.

Wilson, a miner killed by explosion caused by a light which he held coming in contact with fire damp, caused by the alleged fault of the defendant's servants in obstructing ventilation by a scaffold.

Jack, general manager of works (p. 329).

Neish, under Jack, manager of coal pit.

Bryce, under Neish, had charge of underground operations.

These were all competent. *Held*, that Wilson, Nash and Bryce were all servants in the same employment, and master not liable.

Lord CRANWORTH, statement of rationale is strong, clear and convincing, p. 331.

Lord Ch. CAIRNS' approval, p. 331, 332; note his reasoning.

Lord CRANWORTH states what constitutes fellow servants tersely, and with exceeding clearness; what he says at pp. 334, 335, has a direct application to the case at the bar. I pray the Court to read it.

Lord CHELMSFORD, p. 345, makes this most significant observation:

> If not fellow servants, then if Wilson's fault (*i. e.*, fault of laborer) had injured Neish or Bryce (the foreman), the master would be liable.

So here on like principle, if Coyne's fault had

injured McCormick, the Union Pacific Company would have been liable, which is absurd, and demonstrates the fallacy of the position that Coyne and McCormick were not fellow servants.

Coyne and McCormick were "fellow servants," and in the strictest sense and engaged in a "common employment."

The words "fellow servant" and "common employment" are misleading, if they are understood to be limited to cases where the servant injured and the servant causing the injury are working side by side in the same precise work, as shown by Lord Ch. CAIRNS, L. R., 1 H. L. Cas., Scotch App., 331, 332 (Wilson vs. Merry), and by SHAW, C. J., in Farwell's case, where an engineer was injured by the negligence of the switchman, and as shown by Randall's case in this Court, where the brakeman working a ground switch was injured by the negligence of an engineer of another train of the company, or if (as above shown) they are to be limited to cases where the co-servants are of equal rank or grade or authority.

THE TRUE INQUIRY IS: *Was the injury that was caused by one servant to another servant one of the ordinary risks of the particular employment?* If so, the grade or department of the faulty servant is of no consequence.

It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the *common course of the business*, all open and palpable risks, including the negligence of all fellow servants in the same employment.

Yarmouth vs. France, L. R., 19 Q. B. Div., 651 (Act 1880).

And in the American law likewise the servant takes all risks in the common course of business, including the negligence of fellow servants of whatever grade except only negligence in respect of the master's personal duties.

This is the true test; and the true inquiry in each case is, was the accident one of the normal and natural risks in the ordinary course of the business; if so, then there is no liability; if not, then there is a liability. Such is the true inquiry, and not one into grades of service or departments of service (see on this point my Brief, 35). This is, as above shown, the rationale of the doctrine, and it is the final form it has assumed and it is the correct doctrine. It is plain, intelligible, rational and practical, and practicable.

Using, however, the common phrase, "fellow servants," and its equivalent, "common employment," how, under the facts of this case, can it be even plausibly pretended that the work of loading rails on a car was, as between McCormick, the boss, and Coyne, the servant, not "a common employment."

The plaintiff's complaint and evidence both show that the work was the simple and single work of loading steel rails on the cars, and *nothing else;* that it was usual and proper that there should be a boss or "some person" to give the workmen the directions so that they might work in concert. Not the master, not necessarily any particular persen, not necessarily McCormick, but only "some person."

Record, fol. 7, p. 3; fol. 25, p. 12.

NOTE AND REMEMBER that the only question in this case is: WERE *plaintiff and McCormick "fellow serv-*

ants!" that is, engaged "*in a common employment*," or rather the true question, otherwise stated, is, Was the accident which happened from McCormick's alleged want of judgment whereby he gave an alleged faulty order, *one of the risks which under the circumstances the plaintiff assumed.*

The work of loading rails was a simple, single and non-hazardous work in which the services of the workmen and the foreman were both necessary, and the end to be attained, that is, getting the rails loaded on the cars, could not be effected on the plaintiff's own theory, as shown by the complaint and the evidence, without the conjoint efforts of both. There was an obvious COMMUNITY OF EMPLOYMENT OR OF SERVICE BETWEEN COYNE AND MCCORMICK.

So are all the cases:—

"Every person who engaged in such an employment must have been perfectly aware that the service was necessarily accompanied with the danger that the person entrusted with the machinery (which lifted the miners out of the coal pit) might be occasionally negligent and fail in his duty"—in the "*common object of bringing the coal to the surface.*

3 MacQueen, 226.

Quoted by FIELD, J.:
Ross Case, 112 U. S., 387.

It well illustrates the case at the bar.
HARLAN, J., in *Hough's* case, 100 U. S., at p. 217:
"The same work or employment with whose habits," &c.

GRAY, J., *in Randall's case*, 100 U. S., 483, 484;

"The duties of the two (brakeman working ground switch and engineer of locomotive) bring them together at the same time and place," &c.

Garrahy's Case—Justice MILLER's decision:

Our opponents call especial attention to the Garrahy case (25 Federal Rep., 258), decided by Mr. Justice MILLER. In that case the plaintiff was engaged with a number of workmen under the control of a foreman in taking up and relaying one of the tracks in the yard of the company. In the yard there was a switch engine, usually employed in transferring cars from one track to another and from one place to another with several hands, including a fireman and engineer, under the control of a conductor. The switch engine struck plaintiff while he was engaged in replacing the rails of a track.

The learned Judge says, in overruling a motion for a new trial:

"After re-examining the matter * * * I remain of the opinion that a common hand engaged in the business of distributing iron rails along the side of a track, to be laid in place of other rails removed from that track, and under the control, with six or eight other men, of a boss or foreman, is not in the same employment as a man controlling and managing a switch engine not *used in carrying these rails, but in moving and transferring from one place to another cars not engaged in the business of relaying said track.* And this, in my personal judgment, as a matter of sound principle, is also the necessary result of the latest decision of the Supreme Court of the United States on the same subject, in the case of C. M. & St. P. R'y. Co. vs. Ross, 112 U. S., 377."

The words which I have in italics obviously distinguish that case from the one at the bar.

Ross' Case Decides Nothing Adverse to the Defendant in this Case.

I refer to Ross vs. Milwaukee and St. Paul Ry. Co., 112 U. S., 377, 1884. Ross, an engineer of freight train, was injured by collision with gravel train. Ross was in charge of the regular freight train, which left Minneapolis on regular schedule time and had right of way over gravel trains except otherwise ordered. McClintock was the conductor of freight train and had entire charge in running it. *It was his duty to show engineer all running orders before leaving the stations.* The gravel train, a wild train, was coming in opposite direction. McClintock received telegram from train dispatcher to hold the freight train at South Minneapolis until the gravel train arrived. Conductor neglected to *deliver to plaintiff the order to hold the train and after the train started fell asleep.* It collided with the gravel train and the plaintiff was injured in consequence of "the gross negligence of the conductor" in violating the regulations of the company. The conductor of the gravel train was also guilty of "gross negligence" in overloading it, becoming stalled and neglecting to put out signals of danger.

Question: Was the company responsible?

Court below charged (p. 378) that the "*Engineer, being under the control and direction of the conductor, they were not fellow-servants in the same common employment,*" *i. e.*, that mere subordination determines liability.

OBSERVE (1) that this Court does not deny the general rule of the master's exemption, but affirms it and states its true ground and reason, viz., "that the serv-

ant takes upon himself the ordinary risks incident to the service * * * There is necessarily incident to the service of each the risk that others may fail in vigilance and caution essential to his safety" (pp. 382, 383).

(2) It states the English rule of master's exemption when he delegates his duties to a competent "foreman, manager, or superintendent" (p. 389). Such exemption in England is complete and total; but more reasonably in this Country such exemption (as this Court holds), does not thus exist with respect to the master's *personal duties;* but it does as to all duties not personal to the master.

But (3) The rule of exemption ought not, say the majority, to extend to a case where the Master puts into action *a dangerous force,* commits this to the sole control of a conductor whose *entire* duty is that of direction and is departmental, and where the party injured has no voice or part in the act or omission that causes his injury; in such a case there is no common service, and the conductor is a vice-principal, or as Judge FIELD phrases it, "the personal representative of the corporation" (p. 390).

P. 390 and see near bottom of page "*that brakemen, porters and engineers are fellow-servants with each other but not of conductor,*" "since as to them and the train the conductor stands in the place of and represents the corporation" (p. 390).

(4) Court did not approve the instruction below that mere difference in grade or subordination was the test of liability, but held it not erroneous *under the conceded facts of the case* (pp. 394, 395).

(5) Four Judges dissented: BRADLEY, MATTHEWS, GRAY, BLATCHFORD, JJ.; WAITE, MILLER, FIELD, WOODS, HARLAN, JJ., concurred.

Judge BREWER's understanding of and comments on Ross Case (see my Brief, p. 30, and foot-note*).

The Ross Case,

Is distinguishable from the case at the bar:

1. *There* work and perils were fearfully hazardous to life; *here* ordinary and non-hazardous.

2. Conductor *there* was in charge of a "distinct department, and 'his duty *entirely* one of departmental direction and superintendence;'" *here* otherwise.

3. The duty to observe the company's own specific written rules in so vital and hazardous a matter might, if the question were open for settlement *de novo*, well be added to the list of the master's *personal duties*, thus making the conductor a vice-principal; it would be ridiculous to add to the personal duties of the master the duty of loading rails on a car.

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* NOTE.—Mealman, engineer of switch-engine, killed by fault of another engineer, who it is alleged obeyed the signal of the master mechanic having sole charge of the yard.

BREWER, J., says: "MCCRARY, J., in Ross Case, held that subordination determines liability. I don't believe that proposition. In Ross' Case the Supreme Court intentionally declined to pass upon it.

"I think it necessary, not merely that there should be subordination but departmental control, such extended authority, that the Court may justly say, he is a vice principal, the general superintendent, the superintendent of a division, or of roads and bridges—any person who has a department under his control; and the Supreme Court say that a conductor stands in the category" (Mealman vs. Union Pacific R. R. Co., 37 Fed. Rep., 1889; 1889, *Col.;* BREWER, Cir. J.).

I can understand how the Court might say, "the whole doctrine of common employment is wrong, and we have been wrong in saying it was settled, and we will now overthrow it;" but I cannot understand how, without overthrowing it, it can have any existence and not embrace the ordinary and simple case now at the bar.

Though I have no time to argue it orally, I rely upon Point II. in my brief and beg the Court's consideration of it.

McCormick was not guilty of negligence, since if he had ordered the men to go to another car and load the rails, not going with them, and one of the men had been injured, the company would not be liable. So, he being present, an order "to load the rails," not specifying the mode, is not negligence. And such was the exact case here. So McCormick might appoint one of the men to take his place on this work (this is done every hour), and if such appointee should give an order, alleged to be faulty, the case would be the same as it is now, though such appointee had no power to discharge men from the service.

My Brief, pp. 37–41.

APPENDIX.

Supreme Court Cases.

SUPREME COURT UNITED STATES.

DECISIONS IN WHICH THE LIABILITY TURNED UPON NEGLIGENCE OF SERVANTS IN RESPECT OF THE MASTER'S PERSONAL DUTY, AND THEREFORE NOT FELLOW-SERVANT CASES.

I.

1. *Union Pacific Ry. vs. Fort*, 17 Wall., 553; boy of sixteen, employed in machine shop in a perfectly non-hazardous work, was ordered by superintendent to adjust belt among dangerous machinery; *outside* of boy's duty; employer liable. Such is also the English rule in like cases (Smith on Master and Servant, p. *257).

2. *Hough vs. Texas Pacific*, 100 U. S.; engineer killed by *defective engine*; fault was that of the master mechanic, but it was a fault as in respect of master's *personal* duty. HELD not a fellow-servant case, and master was liable if due care was not used by the master mechanic to provide fit and safe machinery. HARLAN, J., gave opinion.

3. *Wabash Co. vs. Daniels*, 107 U. S., 454., HARLAN, J. Plaintiff, a brakeman, injured in a collision caused by McHenry's carelessness, McHenry being a *drunken telegraph operator*. Question was whether company used due care in selecting and retaining McHenry.

4. *North P. C. Co. vs. Mares*, 123 U. S., 710, FIELD, J., Dakota Statute. Brakeman injured by negligence of engineer, who was alleged to be unfit. Question was whether *engineer was unfit* and the company guilty of *negligence* in retaining him.

5. *Cunard Co. vs. Carey*, 119 U. S., affirmed by even Court.

Rope broke suspending tub of coal and injured plaintiff. Question was whether Co. used due cars in providing *safe rope*, which duty it claimed it performed when it provided a proper superintendent of docks.

6. *Kane vs. Northern Central Ry. Co.*, MSS., Oct. 7, 1888.

HARLAN, J.:

Action by brakeman based on the alleged negligence of the Co. in not providing suitable and safe appliances, viz., one of the *cars had "one step off,"* and he called conductor's attention to it, who promised to drop the car and did not. Question turned on the *plaintiff's contributory negligence.*

Ross vs. Mil. & St. Paul R. R. Co., 112 U. S., 377, FIELD, J.:

Engineer on one train injured by the gross misconduct of his own engineer and of the engineer of the other colliding train. HELD, not to be fellow servants and the company liable. This case is in conflict with many others (including, as I think, Farwell's case), and it can only be sustained on the ground that the duty of the conductor under the written rules in view of his powers and the fearful hazards to life and safety which the non-observance or violation of such rules would necessarily cause is that of the employer, and hence, that such an accident caused in such a manner was not within the ordinary risks which the engineer assumed when he undertook the service. The discussion of "grades," "authority" and "departments" in the case are, it is submitted, all subordinate to the above-stated ground of liability, and pertinent only as they illustrate and enforce it.

II.

Fellow Servant Cases Proper, i. e., those in which the alleged fault of the servant is not in respect of any of the personal duties of the master.

Randall vs. B. & O. R. R., 109 U. S., 478, 1883, GRAY, J.:

Brakeman on ground-switch sued for injury caused to him while unlocking a switch, by negligence of engineer of another train in running too fast and not giving warning.

HELD, common servants, and that he could not recover. Same as Farwell's case.

If the brakeman took, as held by the Court, the risk of the negligence of the engineer of the other train; *why not equally the negligence of his own engineer?*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888. No. 48.

JAMES COYNE,

Plaintiff in Error,

against

THE UNION PACIFIC RAILWAY COMPANY.

ARGUMENT FOR THE DEFENDANT IN ERROR

BY

JOHN F. DILLON.

Burgoyne Quick Printing Co., Cor. Walker and Centre Sts., New York.

Supreme Court of the United States,

OCTOBER TERM, 1888. No. 48.

JAMES COYNE,
Plaintiff in Error,

AGAINST

THE UNION PACIFIC RAILWAY COMPANY.

Argument for Defendant in Error by JOHN F. DILLON.

THIS IS AN ACTION brought by the plaintiff in error against the Union Pacific Railway Company, in the Circuit Court of the United States, for the District of Colorado, to recover damages for personal injuries. The cause was tried below upon an amended complaint and answer. Certain evidence was introduced by the plaintiff in error tending to prove the allegations of the complaint. Upon this evidence and the pleadings the Court instructed the jury to find for the defendant, and a verdict was rendered accordingly. The plaintiff excepted to this instruction, and afterwards moved for a new trial, which motion was overruled; and to the ruling fo the Court denying the motion, the plaintiff excepted, and after judgment sued out this writ of error.

THE FACTS, *as shown by the bill of exceptions, are these*: Coyne, the plaintiff in error, was in May, 1882, employed by the defendant as a construction hand or laborer upon its railroad, and was under the charge and direction of one McCormick, a construction boss or foreman. In the company of McCormick and other persons employed by the defendant the plaintiff proceeded to a place about two miles east of Byer's station on the line of defendant's railroad; and at that place, the plaintiff together with other servants of the defendant was engaged in loading rails about forty in number upon a flat car. The character of the work and the manner of its performance is thus stated in the bill of exceptions (Record, p. 11):

"That each of said rails was of about the length of from 24 to 29 feet, and of the weight of from four to six hundred pounds; to lift either thereof the labors of about ten men were required, and said plaintiff and the said other servants, under the command of the said McCormick as aforesaid, were accordingly divided into two gangs of ten or more men each; that in loading the said rails each of said gangs of men were required and directed by the said McCormick to act in concert, and to first lay hold of and lift the said rail, and walk with the same to the said flat car and there halt, dress, and at the word of command given by the said McCormick to lift the said rail and cast the same with one motion upon the floor of the flat car.

"That by reason of the length and great weight of said rails it was necessary in loading the same upon flat cars to avoid injury to the workmen engaged therein that care, deliberation and concert of action should be observed, and that some person should give the word of command in each of the several stages of progress in loading the same, and particularly at the point where the rail was to be thrown upon the car; that prior to the injury complained of the said McCormick had controlled and directed the men in the loading of the rails."

After stating that McCormick urged the men to hurry, owing to the approach of another train, the bill of exceptions thus describes the accident in loading the last rail which resulted in the injury to Coyne:

"While the plaintiff and the other men so holding the said rail were awaiting the word of command to lift the same, the said McCormick, with further oaths, imprecations and harsh and violent commands, ordered the said party to get the said rail on in any way they could, not giving to them any word of command, and that thereupon the said party hurried and agitated by the oaths and imprecations and violent commands aforesaid of the said McCormick, lifted without concert, some at one moment and some at another, and threw the said rail at one end with force and at the other end with less force, so that the same, being thrown by the said party, struck upon the side of the said flat car at one end and fell backwards; that plaintiff, seeing that the said rail was about to fall, endeavored to retreat out of the way thereof, but in so doing was unable to avoid the falling rail, which fell on plaintiff and bore him down, and broke and crushed plaintiff's foot and leg thereof."

ARGUMENT.

The unanimity with which the Courts have adopted the legal principles which govern the class of cases of which this is one is equalled by the diversity of opinion displayed in applying those principles to the varying facts of particular cases. The general rule is, and it is the settled rule wherever the common law prevails (unless changed by statute), that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of his employment. Another statement of the rule that a person who enters into the service of another in a

particular employment assumes the risks incident to such employment, and that among these risks are the negligent acts of all who serve the same master, work under the same general control and derive compensation from the same common source.

Such is the rule in this Court as frequently decided by it. Thus, in the recent case of *Northern Pacific R. R. Co. vs. Herbert*, 116 U. S., 642, 647, it is said:

"The general doctrine," says FIELD, J., "as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow-servant in a common employment, is well settled. When several persons are thus employed there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion, 'He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.' *Chicago and Milwaukee Railroad Co. vs. Ross*, 112 U. S., 377, 383."

To the same effect is the language of MR. JUSTICE GRAY, in *Randall vs. Railroad Company*, 109 U. S., 483:

"The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment."

THE REASON FOR THIS RULE, that the master is not liable for injuries which result from the negligence of a fellow-servant, has been clearly expounded by LORD CRANWORTH. After stating the liabilities of masters to

third persons, his Lordship thus proceeds to deal with the master's liability to his servant:

"But do the same principles apply to the case of a workman injured by the want of care of a fellow-servant engaged in the same work? I think not. When the workman contracts to do work of any particular sort he knows or ought to know to what risks he is exposing himself; he knows if such be the nature of the risk, that want of care on the part of a fellow-servant may be injurious or fatal to him, and that against such want of care his employer cannot by any possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame is wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibilityof a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work."

Bartonshill Coal Co. vs. Reid, 3 Macq., 282.

This passage is approved by CAIRNS, L. C., in *Wilson vs. Merry*, L. R., 1 H. L. Sc., 326.

But exemption from liability arising from the risks of the employment in favor of the master is not absolute. The master is held by the contract of service to assume the performance of certain duties towards his servants; and for a failure to perform such duties resulting in an injury to the servant, the master is held responsible. These duties grow out of the fact that the servant does not assume risks greater than those which fairly and properly belong to the employment in which he is engaged. In other words, the servant assumes the ordinary, and not the extraordinary risks of his employment.

The confusion which exists in this branch of the law arises from the difficulty of determining what are the ordinary and what are extraordinary risks of the employment. The nature of the master's duty and its extent have frequently been presented to this Court, and the obligations which the law has created, as shown by its decisions, are:

1. The exercise of reasonable care to furnish suitable machinery and appliances to carry on the business for which he employs the servant.

Hough vs. Railway Company, 100 U. S., 213.
Northern Pacific Ry. Co. vs. Herbert, 116 U. S., 642.

This is a continuing duty and involves the exercise of like care in keeping such machinery and appliances in repair, including the duty of making inspections, tests and examinations at proper intervals.

Railroad Co. vs. Herbert, 116 U. S., 642.
Cunard S. S. Co. vs. Carey, 119 U. S., 245.

2. The exercise of like care in not subjecting the servant to risk of injury from unskillful, drunken, habitually negligent or otherwise unfit fellow servants.

Wabash Ry. Co. vs. McDaniels, 107 U. S., 454.

3. The exercise of care when the master employs a youthful and inexperienced servant to see that he is not employed in any more hazardous position than that for which he was employed, and to

give him such warning of his danger as his youth and inexperience demands.

Railroad Co. vs. Fort, 17 Wallace, 553.

As these are duties which the master must perform, he cannot, by delegating his powers and authority to a servant or agent, escape responsibility for their non-performance on the ground that the negligence of such servant in the performance of such duty, is the negligence of a fellow servant for which the person injured cannot recover as against the master. Cases involving questions as to the performance of any of the master's duties are not properly speaking "fellow servant" cases at all. In this connection the language of Mr. Justice GRAY in Randall vs. Railroad Company, 109 U. S., 483, is pertinent. He says:

"The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This Court has not hitherto had occasion to decide who are fellow servants, within the rule. In Packet Company vs. McCue, 17 Wall., 508, and in Railroad Company vs. Fort, 17 Wall., 553, the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; in the one case, he had wholly ceased to be the defendant's servant; in the other, being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant. In Hough vs. Railway Company, 100 U. S., 213, and in Wabash Railway Company vs. McDaniels, 107 U. S., 454, the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants."

THE FUNDAMENTAL DISTINCTION between cases presenting questions as to who are "fellow-servants"

entirely apart from any duty which the master has to perform, and cases involving the master's responsibility for the negligent performance of duties delegated to a servant by the master is clear; and in most of the courts in this country is carefully observed. Often, one person acts in two capacities, namely, as the representative of the master to perform certain duties, and also as a servant engaged in a common employment with the other servants. This is well stated in the opinion in Ford vs. Railroad Company, 110 Mass., 241, quoted with approval by the Court in Northern Pacific Ry. Co. vs. Herbert, 116 U. S., 650, 653, and in Hough vs. Railroad Company, 100 U. S., 219, in the latter of which cases it is said:

"A leading case upon the question before us is Ford vs. Fitchburg Railroad Company, 110 Mass., 241. That was an action by an engineer to recover damages for injuries received by the explosion of his engine, which was old and out of repair. His right to recover was disputed upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs.

"But the Court said: 'The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are em-

ployed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require.

"The Massachusetts Court adds:

"In the one the master cannot escape the consequence of the agent's negligence if the servant is injured; in the other he may."

As duties of the master towards his servants are generally delegated to some one who occupies a superior position to the generality of servants employed in the particular work, by an easy transition, the question of the relative grade of superiority of one servant over another is in some cases held to constitute a test as to who are fellow-servants within the meaning of the general rule. In this way much of the confusion which at present exists in the law has resulted; and cases are not rare in the books which present American courts of learning and ability in the position of laying down the general rule as to the master's liability for acts of fellow-servants with clearness and force, adopting without dissent the general definitions of what constitutes common service, and yet, of holding in the particular case before them, without undertaking to show an exception to the rule or definition, that the servant who causes the injury is not a fellow-servant with the servant injured, when such servants clearly fall within their own definition and within the reason of the general rule as to the master's liability. Having placed their decisions upon the wrong foundation, these courts, by a process of judicial legislation tempered with seeming judicial mercy, have reached a result which is at once

illogical and indefensible. This statement, explanatory of the confusion in the law on this subject is, perhaps, unnecessary here, but it is made for the purpose of calling the attention of the Court to the reasoning upon which many of the cases that will probably be cited on behalf of the appellant, rest; which reasoning, when carefully considered, clearly shows the unsoundness of the result reached.

In order to show error in the judgment below the plaintiff in error must establish two propositions, namely: first, that the injury to him was the result of McCormick's negligence unaccompanied by negligence on his part; and second, that McCormick was negligent in the performance of some duty which the railway company owed to the plaintiff in error, the performance of which was part of the company's duty, or that the nature of McCormick's employment considered entirely apart from any question of the master's duty was such that he was not "a fellow servant" with the plaintiff in error. If the second proposition is decided against the plaintiff in error the first falls with it; hence the attention of the Court will first be called to the relation which existed between McCormick and the plaintiff. We maintain

I.

That for the negligence of McCormick, if any there be, the Railway Company is not responsible, because the injury was not the result of the non-performance of any

duty which the master owed the plaintiff, nor did the relation which existed between the plaintiff and McCormick take the case out of the general rule as to a master's liability for acts of fellow servants.

The first branch of this proposition is easily disposed of. What duty did the railway company fail to perform? We fail to see any. The plaintiff did not allege or seek to show and could not show that McCormick was generally an incompetent or unfit servant in the employment or retention of whom the railway company violated one of its duties. The negligence in causing the injury complained of is not sufficient to establish habitual negligence.

Wharton on Negligence, § 238 and cases.

Such orders or signals are often used by gangs of men in the performance of heavy work requiring concerted action; but there is no case, it is believed, in the books imposing as a matter of law the duty of giving such command or signal *upon the master*. The plaintiff does not allege that in giving such orders McCormick was undertaking to perform any duty which the railway company personally owed its servants and which the law required the railway company personally to perform. The imposition of any such duty would subject the master to the obligation of personally inspecting and directing the performance of every detail connected with the work and render him an insurer of the servant's safety. The complaint does not allege that it was the duty of McCormick to give these commands or signals. The lowest man in the gang could have given them; and in

such work these words are frequently given by one of the gang. Certainly if the railway company owed no duty to give such signals or to have them given, the duty cannot be created and imposed by law upon the railway company simply because McCormick undertook to give them. If the railway company owed no duty in this respect it is no more responsible for McCormick's acts than it would have been for the failure of any one of the gang who had previously been giving such orders.

IT IS URGED BY THE PLAINTIFF IN ERROR (Brief, pp. 4, 5), that the company is liable on the ground that McCormick, by reason of his power of superintendence and control over the plaintiff and over the work in question, *was a vice-principal, and not a fellow-servant or co-employee.* This we deny.

A VICE-PRINCIPAL is one to whom the employer commits the entire or general charge of his busines, as *e. g.*, the manager of a mine or factory, or is one to whom the employer commits the general control of some "distinct department" of it and who in such department represents the master in respect of such duties as the master is bound to see are properly preformed (Murphy vs. Smith, 19 C. B., N. S., 361; Chicago, &c., R. R. Co. vs. Ross, 112 U. S., on pp. 389, 390, per FIELD, J.). How the foreman of a gang of laborers employed in the simple work of repairing a railroad can be regarded as the "the vice-principal," that is to say, as representing the master in respect to those personal duties of the master towards servants which the master is bound to see properly performed, or how it can be

said that such foreman and the laborers under him "are engaged in different departments of duty" (100 U. S., p. 222), we cannot understand. It is a misuse of language so to describe McCormick. A lower grade in the service of the railway than that occupied by McCormick probably does not exist, and if McCormick is a vice-principal, what other official is not? The cases against the proposition that McCormick is a vice-prinpal are very numerous. Take, for example, the case of McCosker (84 N. Y., 77). There Luke, the yardmaster, having authority to direct the making up of trains and movement of cars in the yard, with authority also to employ and control assistants, employed McCosker, and by reason of the yardmaster's negligent signal to an engineer, McCosker was injured. It was contended that the two were not fellow-servants, but the Court said:

"McCosker was employed to handle and move to the repair shops damaged and disabled cars, and took the risk of his employment in that respect. While engaged in attaching the broken car to the one in front with the aid of a chain, and by direction of the yardmaster, the latter negligently, and at the wrong moment, signaled to the engineer to back his train, and as a consequence the deceased was crushed between the cars. The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair-shop. What the yardmaster was doing was the work of a servant in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yardmaster from the negligent performance of which the injury resulted." * * * "The doctrine established by our decision in *Crispin vs. Babbitt* (81 N. Y., 516), is fatal to the plaintiff's claim."

See also Brick vs. Rochester, &c., R. R. Co., 98 N. Y., 211, where the general foreman (one Thompson) of a repair construction train was held not to be the vice-principal of the company in the work of repairs, but was a co-employee or fellow-servant with those under him. The Court say:

"The fact that Thompson had imposed upon him larger duties, embracing the reconstruction of the entire road, does not alter his relation here, and it is sufficient to say that at this time he was acting as foreman or superintendent of a number of men employed by the company to repair its old road, and was on the construction train for that purpose. He thus became and was a co-employee with the others who were there, and was not relieved from responsibility because he had other and more important duties to perform outside of those in which he was specifically engaged. Even if Thompson may have been regarded as representing the master in some respects in reference to the road generally, the duties he was at this time performing were those of a fellow-servant and not of a master, and hence if he was chargeable with negligence, it was that of a fellow-servant, and not of the master within the principle of well-considered cases."

McCormick was not, therefore, in this matter "the vice-principal" of the company as that word is used in some of the cases on this subject. In this particular service and act the plaintiff and McCormick were co-employees and fellow servants within the meaning of the established rule of law on that subject.

No question as to defective machinery is presented in this case. The approach of the freight train so graphically described and dwelt upon by the plaintiff, did not cause the injury. The gist of the plaintiff's action, as stated in his complaint, is the failure of McCormick to deliver the commands "Raise," "Heave" (see Record, p. 4). This is clear, for on the

plaintiff's own showing if McCormick had given these commands or signals, and afterwards in attempting to throw the rail upon the car the men handling the rail had failed to act in concert, and through this lack of concert the same injury had resulted to the plaintiff, he certainly would not have been entitled to recover, and probably would not have sought to do so. It is because of McCormick's failure to give these commands that the plaintiff seeks to recover, and upon this ground alone. It was neither alleged nor proved, nor attempted to be proved, that it was McCormick's personal duty to give these orders or to give any order. It is not alleged that it was the duty of the Railway Company to see that such orders were given; nor was any proof introduced tending to establish such a duty. The only allegation in the complaint on this subject is the following:

"It was necessary, in order to load them [the rails] with safety and despatch, that the gang so loading them should act in concert and under the orders and at the word given by some one person."

It is confidently believed that the Railway Company cannot, upon the facts in this case, be held liable on the ground of any failure to perform any duty which it owed to the plaintiff. In other words, this is purely a "fellow-servant" case within the language of Mr. Justice GRAY, in Randall vs. Railroad, 109 U. S., before quoted. Was McCormick a fellow-servant within the meaning of the general rule? On what ground can the plaintiff claim that McCormick was not a fellow-servant with him? Upon the allegations in the complaint and the evidence introduced by the plaintiff there are but two possible grounds. These are based

upon the allegations contained in the fourth paragraph of the complaint (Record, p. 3), alleging that the plaintiff was placed under the direction and control of McCormick; and the evidence stated in the bill of exceptions (Record, p. 11), as follows:

"That said McCormick had authority to control and direct and compel obedience of the said plaintiff; also, in his discretion, to discharge the said plaintiff or any other servant of the said defendant working under his direction and control."

Upon these allegations and proof two points alone can be raised, namely: First, that the power to hire and discharge servants *ipso facto* renders one who would otherwise be a fellow-servant with those employed not a fellow-servant in respect of any act connected with the service; and second, that the power of direction and control, or superiority, entirely disconnected from any duty of the master, the performance of which is delegated to the servant, produces in law the same result. The two points will be examined in the order named.

I. IT IS CLEAR THAT THE POWER TO HIRE AND DISCHARGE SERVANTS DOES NOT RENDER THE MASTER LIABLE FOR THE NEGLIGENT ACTS OF HIS SERVANT, TO WHOM THIS POWER IS GIVEN, WHEN SUCH NEGLIGENT ACTS ARE PURELY ACTS OF PERSONAL NEGLIGENCE ON THE PART OF SUCH SERVANT IN THE COMMON EMPLOYMENT IN WHICH THE SERVANTS ARE ENGAGED.

The exercise of due care in the employment of competent servants is one of the duties which the master is required to perform, and which cannot be delegated to a servant so as to escape liability on the part of the master. In order to recover

for an injury the negligence complained of, both on reason and authority, must be the negligence of an incompetent servant employed with knowledge of his incompetency or retained after his unfitness for the place has been brought to the notice of the master. The ground for the recovery in such cases is not the negligent act which resulted in the injury, because the servant causing the injury *is* a fellow-servant, but it is the violation of the *master's duty* towards his servants in employing or retaining such incompetent servant. The fact that the master has given the authority to hire and discharge servants to a servant does not render the master liable for the negligent acts of such servant unconnected with the exercise of that power. No allegation is contained in the complaint that the injury resulted from the incompetency of the fellow-workman of Coyne, who had been employed by McCormick. Neither is there any allegation that McCormick was incompetent, thereby rendering the Railway Company liable for employing him. A distinction, which is founded in reason and justice, is made between the negligent acts of a servant to whom such power is given directly resulting in an injury, and his negligence in performing or his failure to perform the duty delegated to him to employ proper and competent servants; for the first the master is not responsible, for the second he is. Upon what principle can it be held that a person clearly engaged in the same common employment, paid out of the same fund and engaged in prosecuting the same work, is not a fellow-servant merely because he has the power to hire and discharge servants, when the same person, if not vested with that power, would on the same state of facts in other particulars be held to be

a fellow-servant? Is the risk of the employment assumed by the servant injured greater in one case than in the other, or has the master failed to perform any duty in one case which he has performed in the other?

We submit, both upon the facts in adjudged cases and upon the reason of the thing, that the power to hire and discharge, cuts and can cut no figure whatever unless as a defense to what, except for the wrongful acts or orders of the superior servant, would be plaintiff's contributory negligence; for certainly an injury that results from action, by either the one or both, which action would have been the same with or without the power to hire and discharge, cannot be made either more or less negligent by the fact that one of them had some power or authority that he did not use, and which could not reasonably be supposed to have any influence on the action of the other. And in this case it is not claimed that the seizing upon the rail preparatory to throwing it was negligent, or that such seizing was the cause of the accident. It is clear, too, that the seizing of the rail was not only plaintiff's duty, but also McCormick's right and duty to order him to do, and the exact and only apparent duty the company had enjoined upon him, for it is not contended that it was the company's duty to give the special order "Lift, etc." nor is it alleged that there is any danger latent or apparent in "this catching on" to the rail, but the danger resulted not from giving orders that placed the plaintiff in peril, but from failing to give orders that any of the persons could give, and which

were no part of McCormick's duty to give, and which, for aught that appears, some one else had always hitherto given.

The law on this subject is well stated by the Supreme Court of Indiana, ELLIOT, J., in Kruger vs. Railroad Company, 9 Western Reporter, 249 (Indiana), as follows:

"The negligence of a fellow-servant, or co-employee acting as such, will not authorize a recovery in any case, although the fellow-servant or co-employee may be a superior officer, an agent, or a foreman; but if the superior agent is charged with the performance of the master's duty, then, *in so far as that duty is concerned*, his acts and his negligence are the acts and the negligence of the master, and not simply those of a co-employee or fellow-servant."

In support of this proposition, the learned Justice cites:

Capper vs. Louisville, E. & St. L. R. Co., 103 Ind., 305; Atlas Engine Works vs. Randall, 100 Ind., 293; Indiana Car Co., vs. Parker, *supra;* Ohio & M. R. Co. vs. Collarn, 73 Ind., 261–273; Mitchell vs. Robinson, 80 Ind., 281; Hough vs. Texas & P. R. R. Co., 100 U. S., 219; Mullan vs. Philadelphia & S. M. S. S. Co., 78 Pa., 25; Gunter vs. Graniteville Mfg. Co., 18 S. C., 262; Crispin vs. Babbitt, 81 N. Y., 516; Flike vs. Boston & A. R. R. Co., 53 N. Y., 549; Corcoran vs. Holbrook, 59 N. Y., 517; McCosker vs. Long Island R. R. Co., 84 N. Y., 77; Brothers vs. Carter, 53 Mo., 372; Tierney vs. Minneapolis & St. L. R. Co., 33 Minn., 311; Towns vs. Vicksburg S. & P. R. R. Co., 37 La. Ann., 630.

In this connection the attention of the Court is called to the statement of the law which is quoted with ap-

proval in Hough vs. Railway Co., 100 U. S., 219, taken from Ford vs. Fitchburg Railroad Co., 110 Mass., referred to and quoted, *ante*, page .

The Supreme Court of Vermont, Davis vs. Railroad Co., 55 Vermont, 84, adopts as its own the language of the Massachusetts Court. The latter case is referred to and the opinion there expressed is approved by Circuit Judge WALLACE, in Quinn vs. New Jersey Lighterage Company, 23 Fed. Rep., 365. In this last mentioned case the facts as stated by Judge WALLACE were these :

The plaintiff was injured by the negligence of the captain of a barge, owned by the defendant, while engaged in loading the barge with iron rails. The captain at the time was assisting the plaintiff and other employees in the work. In loading the rails, two men worked on the hand-winch, one hooked the tongs upon the rails, and two pushed and guided the rails into the barge, when they were raised by the men at the winch ; and it was the duty of a man at the tongs to give the order to hoist to the men at the winch when the tongs were properly hooked. Prior to the accident one Lee had been at the tongs, and the captain had been helping one of the men at the winch. At the time of the accident the captain was at the tongs, and the plaintiff was one of the men to guide the rails. *The captain gave the order to hoist prematurely, and the rail fell upon the plaintiff*, inflicting the injuries for which his suit was brought."

As the facts in the Quinn case and this case are so similar we cannot forbear to quote the last part of the opinion in that case which clearly states the sound and true rule of law on this subject. :

" The true inquiry in this case is whether the character of the act of the captain was one which it was incumbent upon the defendant to see properly performed. This is the rule of Crispin vs. Babbitt, 81 N. Y., 516, where it was held that the liability of a master for an

injury to an employee, occasioned by the negligence of another employee, does not depend on the grade or rank of the latter, but upon the character of the act, in the performance of which the injury arises. In that case, the plaintiff was injured by the act of the manager and superintendent of defendant's factory, who carelessly started a wheel while the plaintiff was occupied with the machinery. The Court below refused to charge that this was the act of an operative for which the defendant was not liable, and the Court of Appeals held this refusal to be error and reversed the judgment. RAPALLO, J., delivering the opinion of the Court, approved the language of CHURCH, C. J., in Flike's case, 53 N. Y., 549, as follows:

"The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. It is as to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

"This was also held in Hoke vs. St. Louis, etc., R. Co., 11 Mo. App., 574, where it was determined that where a road master of a railroad company, having superintendence of the road department, was negligent in an act which he assumed to do as a mere boss of a gang, and a workman was injured, the company was not liable as for the negligence of a vice-principal. The Court used this language:

"But just as the tortious act of a servant to make the employer liable must pertain to the particular duties of that employment, so the wrongful act of a vice-principal or *alter ego* must be an act done by him as vice-principal. The fact that he is vice-principal in one department of the business does not make all his acts the acts of a vice-principal."

"Applying the rule to the present case, where the captain of the barge was not performing a captain's duty while working at the tongs, but that of a common laborer, his negligence was not that of a vice-principal but of a co-laborer. If he had directed any of the men assisting the plaintiff to do that particular part of the work which he undertook to do himself, as he might have done if he had seen fit, and the plaintiff had been injured by the fault of the one thus selected, the de-

fendant would not have been liable, in the absence of proof that the captain had selected an incompetent man for the place. The plaintiff has no more ground of complaint than he would have had if he had been injured by the carelessness of any of his fellow-laborers. It was the act of a co-servant, and among the risks incident to the employment which the plaintiff impliedly assumed when he engaged in the work. The captain exercised no more control over him than did the other laborers."

In McCosker vs. Railroad Company, 84 N. Y., 77, the facts were these: McCosker, plaintiff's intestate, was employed in the yard of defendant to assist the yardmaster, Luke; he was hired by Luke, and was under his control and supervision. While McCosker was engaged, by the direction of Luke, in attaching a damaged car standing on a track in the yard to another car, Luke negligently signalled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McCosker was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable. In delivering the opinion of the Court, FINCH, J., says: "The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting, not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair shop. What the yardmaster was doing was the work of a servant in the departmemt of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yardmaster from the negligent performance of which the injury resulted."

The authorities are so clear upon this point that further reference to cases is deemed unnecessary.

WE MAINTAIN THAT THE POWER OF DIRECTION AND

CONTROL OR SUPERIORITY, ENTIRELY DISCONNECTED FROM ANY DUTY OF A MASTER DELEGATED TO THE SERVANT, DOES NOT RENDER THE PERSON POSSESSING THIS POWER NOT A FELLOW-SERVANT WITH THOSE WHO WORK UNDER HIS DIRECTION.

The settled and undisputed rule on this subject in England (in respect of which there is no conflict), is thus stated by Prof. POLLOCK on Torts (p. 88):

"It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was by the terms of his service bound to obey. The foreman or manager is only a servant having greater authority; foremen and workmen, of whatever rank, and however authority and duty may be distributed among them, are 'all links in the same chain.' The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work, and he is not answerable further."

On this point, MR. WHARTON, in his work on Negligence, Section 229, says:

"It makes no difference, in the application of the exception, that the employee receiving the injury is inferior in grade to the one by whose negligence the injury was caused."

The law is thus stated in Wood's Railway Law, page 1497:

"A person is a co-servant with each and every person, in whatever department or sphere of service they are engaged, who, in any measure, co-operates in the operation or prosecution of the business, and is subject to the same general direction and control. Superiority in grade or rank does not change the relation, unless the

superior servant is charged with the duties of the master to the servant, so that he may fairly be said to stand in the place of the master in reference to the particular duty from a breach of which injury results."

Judge THOMPSON (Negligence, Vol. II., pages 1026, 1028), makes the following statement of the law:

"Who is a fellow-servant, within the meaning of the rule already given, has been a question of much diversity of opinion, though the decided weight of authority is to the effect that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risk of each other's negligence."

* * * * * *

"The fact that the negligent servant, in his grade of employment, is superior to the servant injured, does not, in the opinion of most of the courts, take the case out of the rule; they are equally fellow-servants, and the master is not liable. Within the meaning of this rule, a mere foreman of work is generally regarded as a fellow-servant with those under his control. But if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department thereof, then the rule may be different."

In Beach on Contributory Negligence (109) the rule is thus stated:

"In the present state of the law the essence of common employment is a common employer and payment from a common fund. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source, and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments, or grades of it, are co-employees, who are held in law to assume the risk of one another's negligence."

See also the cases to which reference has already been made in connection with the power to hire and discharge servants. These statements of the law from the text-bcoks are supported by cases too numerous to cite in an argument of this character. We shall refer to but one.

A case decided recently (1887) in the New York Court of Appeals fully supports the proposition contended for by the defendant in the present case, namely, *that McCormick, although he had power to direct or control the plaintiff in the performance of the act which it is alleged caused the injury was not doing a duty which the master owed to the injured servants, but the two were fellow-servants of the company;* and, therefore, even if McCormick was negligent, the plaintiff cannot recover.

The plaintiff in that case was in the employ of the State on the State boat on Lake Champlain. While he was engaged, under the directions of the captain of the boat, in digging and wheeling clay from a bank near the canal on to the boat, Wells, the captain of the boat, had loosened the overhanging earth, and while the claimant was under it, where he had been set to work by the captain's direction, the earth fell and he was injured.

THE CHARACTER OF THE ALLEGED NEGLIGENT ACT, *i. e.*, whether it is one that relates to the personal duty of the master, and not the MERE FACT OF SUPERIORITY OF GRADE of the servant whose negligence is complained of by another servant, is the test of the master's liability. Accordingly, the Court in its opinion said:

"The master is sometimes responsible for the negligent act of one servant causing injury to a

co-servant. But this liability, when it exists, does not rest upon the doctrine of *respondeat superior*, but solely upon the ground that *in the particular case* the co-servant, whose act or neglect caused the injury, was, by the appointment of the master *charged with the performance of duties which the master was bound to perform* for the protection of his servants, a failure to perform which, or a negligent performance of which by a servant delegated to perform them, is regarded in law the master's failure or negligence, and not merely the failure or negligence of the co-servant. The liability of the master, when the negligence was not his personal act or omission, but the immediate act or omission of a servant turns, as was said in *Crispin vs. Babbitt* (81 N. Y., 516, 521), *upon the character of the act*, and this was but the enunciation of the established doctrine in this State upon the subject.

If the co-servant, whose act caused the injury, was at the time representing the master in doing the master's duty, the master is liable; if, on the other hand, he was simply performing the work of a servant, in his character as a servant or employee merely, the master is not liable. The injury in the case last supposed would as between the master and the servant sustaining the injury be attributable solely to the immediate author and not to the master. In harmony with *the general principle that* THE CHARACTER OF THE ACT IS THE DECISIVE TEST, *it has been repeatedly decided in this Court that the fact that the person whose negligence caused the injury was a servant of a* HIGHER GRADE *than the servant injured, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule, nor make the master liable.*"

* * * * * *

"The negligence consisted in setting the claimant to work under the bank after Wells had loosened the overhanging earth so that it fell upon and injured the plaintiff. The case is within the decisions above cited. *Wells, although captain of the boat, with power to direct those under him, was, nevertheless, a co-servant within the rule.* The manner of proceeding with the work was committed to Wells. It involved the exercise of such discretion and judgment only as is committed to a fore-

man. It is not claimed that Wells was incompetent for his position, and no question as to the suitableness of appliances furnished by the State arises. *It is the ordinary case of mismanagement by a co-employee of superior grade as to the manner of prosecuting an ordinary work, in which he and other employees acting under him were at the time engaged.* This was a risk incident to the employment which the claimant assumed. * * *"

"The case of *Chicago, Milwaukee & St. Paul Railroad Company vs. Ross* (112 U. S., 377), cited in the opinion below, was decided by a bare majority of the Court, and is in conflict with the course of decision in this State and elsewhere."

Loughlin vs. State of New York, 105 N. Y., 159 (1887).

Chicago, Milwaukee and St. Paul Ry. Co. vs. Ross, 112 U. S., 377, may be distinguished from the present case. The conductor in that case represented the company in the performance of an act of such a character as to come within the class of duties owed by the master. A railroad is managed by officers who represent the company. It is the duty of the officers, as representatives of the company, to make rules for the operation of the railroad including, of course, the making of time tables for the running of trains. An engineer obeys such time tables as the order of the company, and only by an order of the company can he rightly deviate from them. If, therefore, the company by its superior officers makes even a temporary change in the running time of certain trains, it owes a duty to its employees who might be put in peril by such change if it were unknown to them, to inform them for the sake of their safety if for nothing else. An order to change the running time of trains is, therefore, an order which it is the duty of the company to communicate to an engineer who may be put in peril by it.

Whatever agents are employed to communicate such order to the engineer are agents of the company representing the company in the performance of a duty which it owes to the engineer. If by the negligence of such agents the order never reaches the engineer the negligence may properly be regarded as the negligence of the company, and the company may be held liable for any injury which results to the engineer in consequence.

As has been stated, McCormick in the present case was not performing a duty owed by the company, but an act of such a character that a fellow-servant might equally well have performed it. For aught that appears to the contrary, any one of the gang might have given the order to lift, heave, &c., as is frequently the case where men are employed in gangs. The case was one of division of labor among fellow-servants, one man to give the order (so that the gang might work in unison), while the others were to do the lifting. It frequently happens that members of the gang takes turns at the different kinds of work. Suppose that one not the foreman happened at the time to be giving the order, it could not for one moment be contended that he was not a fellow-servant within the rule. It ought not to make any difference that the foreman happened at the time of the accident to be doing that part of the work, when any one else might equally well have done it. Suppose that McCormick had been lifting at the same end of the rail as the plaintiff, and by reason of his negligence while doing that work the plaintiff had been injured. Clearly, in such a case McCormick ought to be deemed a fellow-servant. It ought not to be different in the present case, for McCormick

was only doing the work of a fellow-servant in giving the order.

The only exception to this rule of law is that referred to in the latter part of the quotation from Thompson on Negligence, which has had a limited adoption, namely, that if the master has delegated to a superintendent or foreman the care and management of the entire business, or a distinct department thereof, then the rule may be different, referring to the decisions rendered by the Courts of Ohio and Kentucky. This distinction is not generally recognized; but even if it were, and even if sound, this case certainly does not fall within it. McCormick was merely a foreman or boss, with no charge over any department of the business. The complaint does not undertake to show that McCormick occupied any other or higher position. In fact, the allegations in the complaint forbid that any such view of his duties should be taken. The allegations contained in the 3d and 4th paragraphs of the complaint necessarily imply that McCormick was one of several foremen or bosses under whose direction the plaintiff was employed to serve, in the repair and construction of the railroad between Byer's Station and River Bend (a distance of about fifty miles). McCormick did not have sole charge of even this comparatively small part of defendant's road; but others of equal rank were employed on the same portion, with equal power and authority in respect of the work to be performed, the manner of its performance, and the control of those engaged in it.

In view of the fact that the plaintiff in error moved for a new trial, based upon the decision of this Court in the case of *Railroad Company vs. Ross*, 112 U. S.,

377, probably much stress will be placed upon that case as having an application to this, and as an authority in support of the proposition that mere difference in grade constitutes a difference in service. It is believed that this is a misconception of the decision of this Court in that case. Certainly such is evidently the opinion of at least two courts, which would, if this were the fact, feel bound by that decision. See opinion of Judge WALLACE in Quinn vs. N. J. Lighterage Co., 23 Federal Reporter, 363, *supra;* and that of Judge BREWER in Howard vs. Railroad Company, 24 Am. & Eng. R. R. Cases, 448. After stating that the courts of Kentucky and Ohio have adopted the rule that where a master sees fit to place one servant under the direction and control of another, the relation of fellow-servant does not exist, Judge BREWER, in the latter case, commenting on the Ross case, says (page 452):

"Notwithstanding these decisions, the great weight of authority is against the proposition, and the rule of exception in respect to subordination limited to the case of departmental control, as stated in my second proposition. Such, I think, is the clear import of the opinion in Railway Co. vs. Ross, *supra*, which, considered in relation to the course of the trial, and the instructions of the trial Judge, seems to me impliedly to reject the doctrine that mere subordination destroys the relation of fellow-servants, and to insist upon departmental control as the test. In that case the trial Judge charged explicitly as follows:

"'It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, then the two are not fellow-servants, engaged in the common employment, within the meaning of the rule of law of which I am speaking.'

"This was the instruction excepted to. The case was one in which an engineer had been injured through the negligence of the conductor in charge of his train. Now, if the reviewing court had been of the opinion that the rule as stated by the trial Judge was correct,

naturally the opinion would have been an argument in support of it. On the contrary, nowhere in the opinion, which is elaborate and extensive, is there a single word in support or defense. The entire opinion goes to the effect that the conductor of a train, by virtue of his large powers and exclusive control, is properly one 'clothed with the control and management of a distinct department,' and, therefore, to be regarded as a vice-principal, a representative of the company. It is expressly stated that the language of instruction is open to criticism, but is not erroneous, as applied to the facts in the case. In other words, that where departmental control exists, the relation of fellow-servants does not. Further, in every case which is cited approvingly, and which bears directly on the question, the rule of departmental control was in terms recognized; or, as in the Ohio cases, in which the conductor of the train was the negligent party, the facts supported the conclusion of the Supreme Court."

Mr. Justice FIELD, in delivering the opinion in the Ross case, states one of the grounds on which the case rests as follows (p. 390):

"There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants."

While reference is made to Ohio and Kentucky cases, it is evident that the Court did not intend to adopt the rule in force in those Courts that mere superiority in any case constitutes a difference in ser-

vice, because the Court expressly limits their application to the case presented, as follows:

"We agree with them in holding, and the present case requires no further decision, that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

Reference is made in the Ross case to Brickner vs. New York Central R. R. Co., 2 Lansing, and to Malone vs. Hathaway, 64 N. Y., 5. The Court of Appeals of New York certainly limits the exception to the general rule to cases of servants who have either the entire charge of the business or the like charge of a particular department. See McCrosker vs. Railroad Co., 84 N. Y., 77.

There is also an element in the Ross case which was recognized by the Court, which is absent in the case under consideration, namely, that by undertaking to operate two trains upon a single track in opposite directions the master sets in motion a dangerous force which is bound to control; and that in the performance of this duty, the conductor represented the master. Such a duty has been declared and imposed upon persons and corporations operating railroads; and this in Courts which do not recognize any distinction in service growing out of mere superiority. A comparison of two cases, recently decided in the Court of Appeals of New York (Sheehan vs. Railroad Co., 91 N. Y., 332, and Slater vs. Jewett, 85 N. Y., 61), shows the nature

of this duty and the corresponding obligation resting upon the master. In the Sheehan case, the superintendent of the road started two trains in opposite directions upon the same track. This the Court say "entailed upon train No. 337 and its hands certain destruction from No. 50, unless the movement of the latter train was stopped." Instead of telegraphing directly to the conductor and engineer the train dispatcher, whose duty it was to direct the movement of the trains on the road, telegraphed to an operator to hold one of the trains at a certain point until the other passed. The operator failed to deliver the order and a collision resulted; and the Railway Company was held liable for the injury to Sheehan caused by the collision. In the Slater case upon a similar state of facts the train dispatcher sent the order to the engineer and conductor. Through the fault of the conductor, the order never reached the engineer; and the train proceeded and a collision occurred, resulting in an injury to one of the trainmen. The Court held the defendant not liable. Judge DANFORTH thus states the distinction which the Court held existed between the two cases, and in doing so states the underlying principle upon which such cases rest (91 N. Y., 339):

"It is one thing for the orders of the master to go by report or hearsay to the servant, and quite another when they are received by him directly and without an intervenor. In the first they are liable to be conceived wrong, as was the case in this instance, while in the last such mistake is at least improbable. * * * That event (the collision) came from no cause of the existence of which it was ignorant, but from one which it might have controlled. The defendant had created the exigency, and was bound in some practicable way to adjust the running time of train '50' to it, and for the consequences of the omission of any seasonable act,

tending thereto, it was liable. It was not enough to tell Kieffer (the operator) to hold the train. *The duty of holding it devolved upon the defendant*, and its breach was not excused by showing that it would have been held if Kieffer had performed his duty."

That this duty was recognized and that it was an important element in the Ross case is shown by the following reference to the case of Railway Co. vs. Keary, 3 Ohio St., 201, made in the opinion of the Court (page 393):

"In the course of an elaborate opinion the Court said that from the very nature of the contract of service between the company and the employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. 'For this purpose,' said the Court 'the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner as man, and a party to the contract of service, owes to those placed under him, and whose lives depend on his fidelity.'"

The only difference between the New York Court and this Court is in the determination of the question as to when the obligation is performed. The existence of the duty is recognized by both. In the one, the train dispatcher is held to represent the company; and in the other the conductor. That is the only difference; and certainly neither holds that superiority, unconnected with the performance of any duty, constitutes a difference in service. The rendering of a judgment in this case in favor of the plaintiff in error involves that this Court shall hold that superiority,

mere difference in grade, renders servants employed in the same common service not fellow servants; and this in a case where the superior servant was performing an act which any of the other servants could have done equally as well, and which neither in fact nor as alleged by the complaint was necessary for him to do. To create and adopt such an exception while attempting to sustain the general rule will inevitably result in such confusion in the law that in cases of personal injury, neither the master nor the servant in the particular case would be able to know their rights until after actual adjudication. With such an exception established in the law, the more frequent the adjudications in the Courts, the greater the confusion. Each opinion will draw finer lines of distinction and greater refinements will necessarily be introduced. Servants in ordinary employments do not occupy fixed positions with defined grades as in a military organization. As a matter of fact no two servants occupy practically the same relative position. Men in the same grade of employment by their personal characteristics create grades and distinctions which are recognized by their fellows and frequently by their masters. It would only be a question of time when, under such an exception, evidence showing so slight a difference of grade would be introduced and received and properly so. In preference to establishing such an exception to the rule, it would be far better for both parties to this relation that the Court should abolish the rule entirely.

In that event the law would at least be certain. The Supreme Court of Ohio, perhaps the only one where this exception has been adopted, has felt it necessary to cry halt and to limit, if possible, the

exception to the smallest number of cases. In Railroad Company vs. Devinney, 17 Ohio St., 212, it is said:

"The true general rule is, and so it must be, that when men are employed for the prosecution of a lawful but hazardous business they assume the hazards of such employments arising from the negligence of co-employees, and stipulate for compensation according to their estimate of such hazards; subject, however, to this exception, that the master is liable for such injuries as accrued to the servant from the negligence of a fellow servant in the selection of whom the master has been culpably negligent; and to this we in Ohio have added the further exception of a case where the servant injured is subordinate to and acting under the orders of the culpable fellow servant.

"For the reasoning on which the decisions establishing this exception are based, the members of this Court, as now constituted, are not responsible; nor are we at all bound to carry their logic to its ultimate consequences. In subsequent cases, strictly analogous in their facts, those decisions will doubtless be accepted as authoritative; but the case now before us does not require us to review them.

"In adding this last named exception to the rule elsewhere generally established, we have already diverged from the general current of judicial decision elsewhere. A majority of the Court are unwilling to increase the divergence; doubting, as we do, the wisdom of such a step, and being unwilling to assume the responsibility of what would savor so strongly of judicial legislation."

And such will, in time, be the position which any Court adopting such an exception as was made by the earlier Ohio cases will be forced to take.

LET US HALT!

II.

The injury to Coyne was not caused by any negligence on the part of McCormick.

IN THE PLAINTIFF'S BRIEF much stress is laid upon the circumstances which existed *previous* to the time when the rail fell upon the plaintiff, and from *those* circumstances the plaintiff seeks to establish the defendants' liability, based upon McCormick's alleged negligence *in the general management of the train.* Thus, it is in substance stated that McCormick, knowing of the approach of the regular freight train, moved his train out in the face of it (Plaintiff's Brief, pp. 2 and 3). But no negligence is shown in that act. It does not appear that the approaching train was in such proximity as to render it unsafe for McCormick to start out. The train may have been many miles away, and yet have been an " approaching train." Moreover, the work of construction and repair must be done as opportunity offers in the intervals, however brief, between the running of the regular trains. The plaintiff knew all this just as well as McCormick did, and he assumed whatever risk there was in doing construction work under such circumstances when he entered upon his employment. That there was no negligence in undertaking to load the rails under the circumstances is evident from the fact alleged by the plaintiff (Record, fol. 7, p. 4, and fol. 25, p. 12) that all of said rails except two or three had already been loaded before the accident occurred.

If any negligence existed on the part of McCormick in undertaking to load the rails, such negligence was *too remote* to be the cause of the injury to plaintiff.

There was no causal connection which the law can notice between *undertaking to load the whole lot of rails* and the injury which resulted to plaintiff. To test this proposition, suppose that under the same circumstances one of the men who beyond dispute was a fellow workman, had let the rail drop on the plaintiff's foot, *without* any order having been given by McCormick. Clearly, in such a case the negligence which caused the injury would have been the negligence of the fellow workman and not of McCormick. Yet in both cases there would have been the same undertaking to load the rails in the face of an approaching train. It is, therefore, evident that, if there was any negligence on the part of McCormick which caused the injury, it was not negligence *in undertaking to load the rails*, but in the method of loading *the particular rail* which fell upon the plaintiff.

As to the manner of loading the rails the plaintiff proved the following facts (Record, pages 11, 12):

"That in loading the said rails each of the said gangs of men were required and directed by the said McCormick to act in concert and to first lay hold of and lift the said rail and walk with the same to the said flat car and there halt, dress and at the word of command, given by the said McCormick, to lift the said rail and cast the same with one motion upon the floor of the flat car."

It is quite evident that the plaintiff considers and admits that this was a safe and proper mode of loading the rails, and that if it had been continued he would have no cause of action, even if the same injury happened to him (Record, p. 4, fol. 7).

The evidence introduced as to the accident itself is thus stated (Record, page 12):

"That, thereupon, plaintiff, in obedience to the command of the said McCormick, rushed to and seized upon the rail being lifted by the other gang of men and moved forward to the said flat car, and, while plaintiff and the other men *so holding the said rail, were awaiting the word of command to lift the same,* the said McCormick, with further oaths, imprecations and harsh and violent commands ordered the said party to get the said rail on in any way they could, not giving them any word of command."

From this statement it is seen that the men had "moved forward to the flat car." and were standing by its side and were "awaiting the word of command to lift the same." In other words, the men had walked to the car and had there halted and dressed. So far, the proper method of loading the rails described by the evidence had been strictly followed. According to the plaintiff's own showing the next step was "at the word of command given by the said McCormick to lift the said rail and cast the same with one motion upon the floor of the car." The only act which McCormick had to perform to complete the operation on his part was to give the command to lift the rail. Everything else had been done which he ordinarily commanded to be done. As it is expressly proved that the men were required to cast the rail with one motion it follows that one command only was sufficient to cause this one motion to be executed. Now, what did McCormick do that was negligent? It is proved "the said McCormick, with further oaths, imprecations and harsh and violent commands, ordered the said party to get the said rail on in any way they could, not giving them any

word of command." This statement of the testimony is somewhat conflicting, as it states that McCormick gave a command to throw the rail up, and at the same time states that he gave no command; but it is apparent that the men either acted without any command from McCormick, in which case, of course, he was not responsible for what followed, or else he gave the word of command to throw the rail up, which, by the plaintiff's evidence, was the only act he was required to do to complete the operation of loading the rails, so far as he was concerned. It is quite clear, under this statement, that McCormick did everything that the plaintiff claimed he should have done. The only possible objection which the plaintiff can make is respecting the manner of giving the command to throw the rail up. The fact that the command was accompanied with oaths and imprecations does not render McCormick negligent. The orders of a boss to a gang of laborers are not usually expressed in the language of polite society, and are not expected to be. The fact that McCormick hurried the men does not render him negligent or excuse any negligence on their part. The necessity of keeping the construction train out of the way of the regular trains was one of the risks of the employment. Of this the plaintiff had knowledge, and he was also familiar with the fact that at times the work must be performed in a hurried and rapid manner, in order to get out of the way of other trains. Any results which naturally followed from the necessity of hurrying were part of the risks of the employment assumed by the plaintiff. If, owing to McCormick's commands urging the men to hurry the plaintiff became confused, and he

and his fellow workmen failed to act with concert, it was certainly not the fault of McCormick.

A command to hurry does not excuse negligence on the part of the servant to whom the command is addressed.

Taylor vs. Carew Mfg. Co., 140 Mass., 150.

In Railroad Company vs. Jones, 95 U. S., 440, the plaintiff, a construction hand, who was riding on the pilot of the engine attached to the train, was injured by a collision. As the train was about to leave the place where the gang had been at work, the foreman ordered the plaintiff to jump on anywhere; they were behind time and must hurry. The Court held that this did not justify him in exposing himself by riding on the pilot, although this was done with the knowledge, assent or direction of the agents of the company; and that it was error in the Court below *not to direct a verdict for the Railroad Company.*

The mere fact that McCormick accompanied the order to throw the rail up with other commands calculated to make the men hurry, or ordered them to hurry, was certainly not negligence. This, however, upon the evidence, is the only act which he committed out of which the injury could possibly result.

III.

It was not error in the Court below to direct the jury to render a verdict for the defendant.

It is the settled law of this Court that when the evi-

dence given at the trial, with all the inferences that a jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

Randall vs. Railroad Co., 109 U. S., 482 and cases cited.

JOHN F. DILLON,
For Defendant in Error.

[22851]

Oct. 20, '88.—75.